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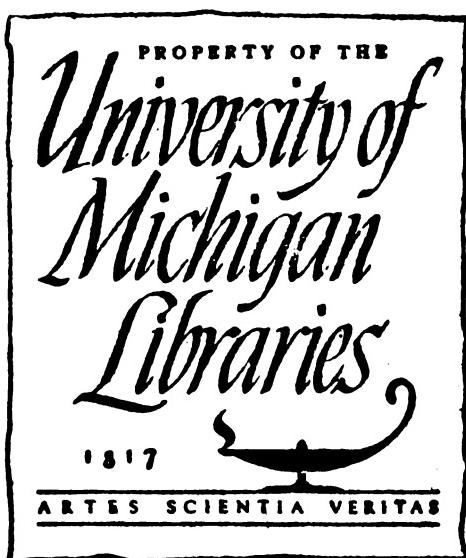
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THE
ELECTORAL SYSTEM
OF THE
UNITED STATES.

A CRITICAL AND HISTORICAL EXPOSITION OF ITS
FUNDAMENTAL PRINCIPLES
IN
THE CONSTITUTION,
AND OF THE
ACTS AND PROCEEDINGS OF CONGRESS ENFORCING IT.

BY
DAVID A. McKNIGHT.

"When the mariner has been tossed for many days in thick weather and on an unknown sea, he naturally avails himself of the first pause in the storm, the earliest glance of the sun, to take his latitude and ascertain how far the elements have driven him from his true course.
"Let us imitate this prudence, and, before we float farther on the waves of this debate, refer to the point from which we departed, that we may at least be able to conjecture where we are now."—DANIEL WEBSTER.

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1878.

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PREFACE.

THE ensuing discussion of the Electoral System of the United States, it may be at the outset frankly acknowledged, owes its origin to a belief that the country requires it:—not that its style, its logic and its argument are of value, these being matters of minor importance; but that its facts and figures, the principles involved and their attested resultants, impartially examined and thoroughly developed, are demanded by a nation whose government is peculiarly representative, and the conduct of whose civil polity must therefore exactly conform to the intelligence and enlightenment of its people. A book is intrinsically valuable, not because of the thoughts it presents, but in proportion to the thought it evokes.

This volume was not made,—it grew, naturally and rationally; it does not seek to sustain a theory,—it establishes a System.

A consideration of the subject was first suggested by the issues raised in the recent Presidential election. In their determination, there were a palpable and a lamentable confusion of opinion and lack of knowledge; intrigue, excitement, and passion were regnant; and it seemed that this diversity of sentiment, this want of decision, this reckless warfare of party and faction and clique, must have their foundation in an ignorance of the facts and a misapprehension of the principles underlying them. The truth of that supposition has been amply demonstrated during the progress of the investigation. So many new and important facts have been unearthed, so many doubtful principles have been firmly established, the author's pre-existing opinions have been so completely reversed, and the electoral scheme is now so clear and simple and beautiful a System in his own mind, that he feels it incumbent on him to invite the public as well to a view of its harmony and perfection.

For ages the generation of the universe has been under consideration, and scholar and sage have bent their intellects to a solution of its magnificent but perplexing problems. The beginning and the end of their inquest is theory. Could they go back to that time when the Creator laid the foundations of the world, and observe the process of its building; could they then regard the new creations wheeling off into space, smoothly and perfectly fulfilling their various functions; difficulty would vanish, diversity give place to agreement, and theories merge in a natural and orderly system.

The two cases are analogous, except in so far as follows. It is possible to-day to revert to the period at which the Electoral System was framed, to observe how block by block it was builded and fashioned by the Fathers, to learn how year after year its principles permeated their practices, as well as to mark their decadence and lapse into existing theories and customs, and to dimly perceive a confusion worse confounded impending in the future. It is possible, nay! easy to do this, and yet no one has thus far found time or inclination to undertake the examination,—not even our statesmen, into whose hands the people have committed the grand trust of an intelligent and systematic administration of their organic law. Fiction has usurped the dominion of fact, principle has been sacrificed to policy, loyal research is degraded into contentious disputation, and the national weal succumbs to the welfare of faction.

But, notwithstanding this ominous state of affairs, a beautiful Electoral System exists, inviting investigation, challenging discussion, and prepared to vindicate the wisdom and sagacity of its founders.

It is obvious that, since our most exalted national office is quadrennially filled through the instrumentality of this System, it should be exactly defined and universally known. Therefore no apology need be offered for the extent and comprehensiveness of this disquisition. The author's design was to gather, collate, and discuss every fact and opinion of moment transpiring since the foundation of the Union, heretofore uncollected and usually difficult of access. It was a most pleasing and absorbing work, and the result is so surprisingly satisfactory to himself, not only in the discovery of the many fresh facts adverted to, but in the evolution of a unique and symmetrical System, hitherto unsuggested, that it is confidently offered as a substantial contribution to the literature of the subject. The facts and principles will

PREFACE.

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speak for themselves, and it is believed that the reader will find new and important developments in every chapter of the book ; whilst the argument connecting them and the method pursued are commended to his kindly and forbearing consideration.

Written during the recent agitation and disposition by Congress of some of the fundamental principles of the System, the work almost of necessity deals with the decisions of the "Electoral Commission" of 1877 ; but the criticism is conducted with impartiality, approving or condemning only where the logical demonstration of those principles requires it. A clear and emphatic pronouncement were wise, and therefore should not be considered objectionable. Since the issue of these decisions was a victory of the Republican party, the author might hesitate to apply the tests of the genuine System to them, were it not for the fact that he has hitherto been a member of that organization ; he therefore feels that he is entitled to express his honest convictions, upon either its deeds or designs, freely and frankly. Republicans or Democrats, we should be patriots only, when executing the Constitution of the United States.

The subject, it will be seen, has naturally divided itself into three branches, to wit, history, criticism, and restoration. The statesman or student may, in the following pages, peruse the entire history of this question in the past ; he may also examine all the collateral facts of record, employed in reviewing the practices and policies of our predecessors ; and he may inspect the new interpretation of the electoral clauses, believed to be the original and only legitimate one, put upon them by the author in discussing the Receiving, Opening and Counting of the Votes. The method of electing a President, and its subsequent influence on his administration, is a living question in the politics of to-day, as it was a vital one in those of a century ago ; the problem is widely discussed at present, and must be more widely considered hereafter, for on its solution doubtless depend the stability and permanency of this nation. Therefore the results of the investigation are summed up, in the last chapter, by a discussion and enunciation of certain amendments and of a new electoral law, in which are comprehended the demonstrated principles of the Constitution, and from which will issue a purification of our national elections and a reform in our civil service. They are consummations devoutly to be wished, difficult to be attained, and to be reverently and persistently sought.

An excellent feature of the proposed law, and as well of the System sustaining it, is this: it effectually harmonizes the existing and precedent diversities of sentiment, in regard to the canvass of the electoral votes. It will be found that they all have grains of truth in them, which require but the fusing effect of the light of knowledge to cement them together in one perfect whole,—the counterfeit presentation of the admirable System as it left the hands of its able and patriot founders. One thing alone is needful, namely, that our statesmen and people re-adopt it in its purity and entirety; if they do, it will assuredly procure for this nation the peace and security which the Fathers designed, which the Constitution provides, and which every lover of his country sincerely desires.

D. A. McKNIGHT.

NEW YORK, March 10, 1877.

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THE ELECTORAL SYSTEM OF THE UNITED STATES.

CHAPTER I.

AN HISTORICAL VIEW.

"The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism."—GEORGE WASHINGTON.

IMPORTANCE OF THE SUBJECT.

THE election of a President of the United States, by the unrestricted suffrage of the several States, has been sometime called "the keystone guarantee of the federal compact."

A discreet student of the history of the Constitution, of its origin and the principles and policies embraced in its construction, will not probably indorse that sentiment in its full significance; namely, that it was the choice of a President by the sovereign States, as independent members of this Union, which alone made a federation possible then and which alone can bind them together indestructibly now. For he finds that the stronger, broader, deeper foundation, upon which the Fathers built so grandly, was the Sovereign People, united not about independent centres whose circumferences may touch, but standing shoulder to shoulder, hand in hand, a phalanx impenetrable, indestructible, perpetual.

Nevertheless the aphorism embodies an important fact, whose significance is pertinent in these troublous times, when the nature and extent of the Federal control over the internal affairs of the States are,

to say the least of it, unsettled and undefined to an unnecessary and an unfortunate degree.

Whilst it is the people who have formed the Union, it is also they who have divided it into States, to whose interests they were bound before the Union won their allegiance, and to which they reserved every right and power not directly, or by necessary implication, vested in the general Government. In their wisdom, at their good pleasure, they endowed the Nation with certain powers of general governance, and at the same time they invested the several States with the attributes of local sovereignty.

In the Constitution no principle stands out more boldly, than the absolute independence of the States in respect to local powers; and of these powers none is more clearly and exactly defined, not only by the whole spirit, but as well by the careful phraseology of the instrument, than that of the election of a President of the United States. No candid mind is deceived if it accept the testimony of either the naked language of the Constitution, the history of its formation, the sources whence it was drawn, contemporaneous interpretation, or the practices and opinions of its earlier disciples; and when these are all united into one consistent whole, they form a System so simple, and at the same time so complete, that one's admiration of the Fathers' wisdom is enhanced, and his reverence is profounder for that noble monument in which their memories are enshrined.

And yet the history of the government under the Constitution is a history of discussion and dissension over the Electoral System, at certain periods during the last ninety years, which culminated in that wide-spread popular excitement and the subsequent bitter, partisan struggle, ensuing upon the election of the 7th of November, 1876. An examination of our history develops the fact that upon no other problem, connected with the politics of the country, has there been propounded such a variety of views, so widely apart, by such able and eminent statesmen, and discussed with such heat and acrimony over so long a period, as those delivered in Congress touching the metes and bounds prescribed to this question by the Constitution. This condition of things is anomalous, occasioned, as it is, by one of the most carefully weighed and measured subjects before the Convention of 1787; and it might be regarded as a curiosity of our politics, were its significance not so grave with import of impending danger in the future,

if a clearer apprehension of the subject and definition of its terms be not attained.

There is but one conclusion possible under the premisses, and it explains the anomaly exactly: namely, the subject must have been approached from the side of prejudice; and that that is the true explanation even a cursory inspection of the Congressional debates will amply demonstrate. There has been no large Websterian mind found, even to this day, in the American councils, that could rise superior to self and party and proclaim the legal, luminous meaning of the Constitution; nor any second Washington, whose patriotism would demand a resignation of his power and station rather than permit infringement on the spirit of the organic law; nor any other candidate, since Clay, whose lips have echoed that noble, grand, sublime, that virtuous and patriotic sentiment, worthy of the crimsoned days of '76, "I would rather be right, than be President!" Since 1792, with scarce an exception, it has been partisan power and profit that have used the electoral section for their own aggrandizement, perverted its meanings, and abused its privileges, until the people and their representatives are confused and mystified, and the fair sky of our political future is overcast with threatening clouds.

Alas! it was this partisan zeal that the Framers of the Constitution so much dreaded, against whose conscienceless encroachments they so carefully provided, of whose blighting influences "the Father of his Country" prophesied so mournfully in his farewell address; and to-day it is this same malignant, mighty spirit which sits in judgment on its legal judge,—the Constitution,—and dictates that interpretation of the latter's maxims which satisfies its own behests.

This is not wise nor just, and, more than these, it is fraught with danger to the permanency of the Union. The Fathers all foresaw it, the earliest expounders of the law foretold it, and the wisest commentators have reiterated the solemn warning. Says Chancellor Kent upon this subject:

"The mode of his (the President's) appointment presented one of the most difficult and momentous questions that could have occupied the deliberations of the assembly which framed the Constitution, and if ever the tranquillity of this nation is to be disturbed and its peace jeopardized, by a struggle for power among themselves, it will be upon this very subject of the choice of a President. This is the question

which is eventually to test the goodness and try the strength of the Constitution."

Circumstances have lately added to the force of this prediction, and though the nation has escaped disaster this time, by some divine protection which seems almost miraculous, the warning becomes all the more solemn and impressive because of it.

It is expedient now that the subject have specific treatment at the hands of the nation, to the end that our statesmen and our people may be united upon an exact interpretation of the rights and privileges involved in the election of a President under the Constitution.

CHIEF POINTS IN DISPUTE.

An examination of the subject may very properly begin with a definition of the several theories which have been held, and the exact points of difference between them.

Article II. of the Constitution defines the creation and prerogatives of the Executive, of which Sec. I. is devoted specifically to the mode of selecting him. In that is the following clause, around which is concentrated the dispute in chief, viz. :

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

At a glance, the language is simple and straightforward, the clause does not appear formidable in its provisions, and unquestionably the authors believed it to be clear and specific ; and yet the fact remains that it has from time to time been put upon the rack of a political inquisition, and tortured into a confession of the most diverse, heterodox and ridiculous intempts that the will of its inquisitors could desire ; the examination being conducted with the end in view not of ascertaining the truth, but of forcing a consent to the selfish claims of a dominant party's demands.

The "Annals of Congress"** disclose the fact that three theories, or interpretations of this passage, have at three stages in our political history held sway at the seat of government ; other collateral and subordinate opinions have existed, but around these three the arguments and proceedings *in extenso* may be logically grouped. With

* Appendix, "Annals of Congress."

an almost extraordinary exactness also the three corresponding periods are mapped out, if one will make an abstract of Congressional action, and the fact is pregnant with significance. In an inquiry of this kind they are patent to any one who reads the discussions and doings therein narrated, with an eye single to the truths abiding in them.

The three theories hinge upon the Counting of the Votes, as it is specially set forth in the phrase, "and the votes shall then be counted." All the apparently simple and natural meaning is crushed out of it by common consent, and it is held to be possessed of a spirit of singular import and potency.

The first theory is, that the President of the Senate shall count the votes; the second is that there is a *casus omissus* in this regard; and the third is that the two Houses present shall count.

Concurrently with these come other theories of greater or less political value, as for example: concerning the force of Count, whether it be "canvass" or only "enumerate"; of the significance of Votes, whether they be the actual votes opened by the President of the Senate, or the lawful votes contemplated by the Constitution; as to the extent of Certificates, whether it includes all the certificates sent in, or those only which are regular and legal; and in regard to the scope of "all," whether it covers the certificates transmitted, or only those which may be received. Besides these there are others of still more subordinate worth, which will receive examination in due time.

FATHERS AND CHILDREN DIFFER.

At this point we may well stop for an instant to observe how very wide a divergence is that indicated by the conflicting theories just mentioned from the opinions of expositors contemporaneous with the foundation of the Union, and to learn a very palpable truth therefrom concerning these vain imaginings of later times,—that they are impostures and fallacies unworthy the subject, and dangerous to the peace of the nation.

No. LXVII. of the "Federalist" descants upon the virtues of the Electoral System in such glowing terms that an honest heart must bow in shame, as it is read, over our modern and degenerate views:

"The mode of appointment of the Chief Magistrate of the United States is almost the only part of the System of any consequence which has escaped without some censure, or which has received the slightest

mark of approbation from its opponents.* The most plausible of these, which has appeared in print, has even deigned to admit that the election of a President is pretty well guarded.

"I venture somewhat further, and hesitate not to affirm, that if the manner of it be not perfect, it is at least excellent. It unites in an eminent degree all the advantages, the union of which could be wished for!"

That is a bold opinion, carefully considered and strongly expressed ; and it emanates from the pen of Alexander Hamilton, the delegate from New York in the Convention which framed the Constitution, who possessed, perhaps, as clear a legal mind as has ever undertaken its analysis. The latter criticism does not cover the whole Electoral System, but specifically concerns the "manner" of election, the very point in question among our modern statesmen, who would decry, as full of flaws, what Hamilton has declared to be almost perfection, and what the American people once accepted as complete with no dissenting voice.†

Add to the foregoing the testimony of Chief Justice McKean, of Pennsylvania, whose eminent forensic ability is undimmed to this day, and who in 1776, at a moment's notice and at one sitting, framed a constitution for the State of Delaware which was subsequently adopted without alteration or amendment. A true genius, both in jurisprudence and statesmanship, he used the following language before the convention of Pennsylvania, while discussing the adoption of the Constitution in 1788 :

"The law, sir, has been my study from my infancy, and my only profession. I have gone through the circle of office in the legislative, judicial, and executive departments of government ; and from all my study, observation and experience, I must declare that, from a full examination and due consideration of this great system, it appears to me to be the best that the world has yet seen."

* The cause of this general approbation is explained in Chapter iii., "Proof by Practice of the Confederation," and in Chapter x., "Early State Constitutions."

† Chapter ii., page 26, the statement of James Wilson.

THE FIRST THEORY.

Proofs of the following statements, which are anticipatory generalizations from succeeding chapters, will in due time appear.

From the time of the first Congress in 1789 to the year 1821, history shows that the unquestioned custom was for the President of the Senate to "declare" the votes officially, whilst Counting was, what the language of the law would seem to convey clearly enough, simply "enumeration."

It is not held that there were no other claims, or counter propositions, for there were, undoubtedly, the first one originating in 1800, as will appear; but the sense of Congress, as evidenced by their general proceedings and enactments, was conclusively in favor of the custom stated.

During this period it was that the Framers of the Constitution occupied the seats of honor in the nation, and, particularly during the first fifteen years, were conspicuous in the halls of Congress. The names of Langdon, King, Sherman, Madison, Pinckney, Ellsworth, and Few are prominent among them. This fact is of moment, and should be remembered carefully; it is an item of value in the argument of this knotty problem.

About the year 1821 a change of opinion began to set in, almost imperceptibly at first, but gathering in proportion as time passed, as is the custom with all revolutions in public sentiment. One can almost trace step by step the progress of this decadence, its results are so marked in the Congressional record.*

THE SECOND THEORY.

From 1821 to 1861 it was generally held that a *casus omissus* existed in the Constitution, and that no one was empowered to "count"; whilst Counting was used in the broader and unwarranted sense of "canvassing."

It was the political history of the Bible repeating itself, for human nature was the same in the primitive ages of the world as it is in this enlightened nineteenth century: "Now there arose up a new king over Egypt, which knew not Joseph."

* Appendix, "Annals of Congress."

The Fathers had altogether disappeared from public service, and the leaders of the nation were such as Calhoun, Clay, Benton, Webster, and Jackson, men of intellectual brawn and muscle ample enough to determine any problem in the Constitution. These leaders dealt only with the electoral question in its minor aspects, whilst their energies were bent to the grander task of preserving the walls which their predecessors had been slowly building. Therefore when the question presented itself, it was brushed aside as trivial in view of their more important work, and thus was sown the seed of indifference and neglect, of which, as it was then prophesied, this generation is reaping the reward.

During this period numerous amendments to the Constitution were proposed, defining the mode of determining contested Presidential elections, which proves that Congress regarded their vested powers as inadequate. There were but two parties to the contest, the President of the Senate and the Congress, legion against one, and it is not surprising that the victory inclined toward the side of the more powerful body. Naturally, too, the public sentiment began to change, educated insensibly by the attitudes of political leaders. So that we are prepared, by a reasonable consideration of the history of the times, for those two remarkable opinions, enunciated about this period by the two ablest jurists who have written commentaries on the Constitution; it being remembered that there was nothing special in the affairs of the nation at that date, which demanded of them a categorical examination and decision of the mooted question.

Kent states that he "presumes" that the President of the Senate counts the votes in the absence of legislation; and Story admits the question to be an important one, his language implying that he considers the constitutional provisions defective.

These opinions, coming from two such minds, are not "opinions" in any rational sense, but a clear refusal to deliver an opinion, after the manner of that day.* No better illustrations of the then existing sentiment could be given, though to them may be added the fact that the Hon. Thomas H. Benton, in his "Thirty Years' View," embracing all the political questions of moment from 1821 to 1851, never refers to this particular one, though it was debated over and

* Chapter viii., "Kent, Story, and Marshall."

over again, and at times assumed an almost threatening importance. This temporizing policy extended all the way to the year 1861, so that, for example, in 1857, Mr. Mason, President *pro tempore* of the Senate, ruled in favor of his own power to order the counting of a vote and to declare the result of an election ; at which Congress became excited and declaimed furiously, whilst neither party finally decided which was in the right.*

About this time it began to appear that the statesmen of the nation, who had been battling manfully in defence of the Union, were to fail ; and in 1861 that failure was an accomplished fact, ushering in the War of the Rebellion with all its attendant and consequent social and political transformations. The people then arose in might to save the Union, which had been founded surely on the rock of their sole sovereignty, and which their leaders had been unable to protect by law or logic.

THE THIRD THEORY.

In 1861, then, began the third period referred to, continuing unto this day, which has been swayed by the general belief that Congress possess the right to "count," i.e., to enumerate as "an affirmative act"; and that the "votes" are, of course, the "legal votes," which thus devolves on Congress also the power to determine their legality.

It is clear, even in the view of the advocates of this theory, that the phrase, "and the votes shall then be counted," is ambiguous, and that they can only claim the right to canvass *ex necessitate rei*. In canvassing the returns they have transcended all the powers of former Congresses, and investigated even the details of local State elections, rejecting or admitting an Elector's vote on the ground that the choice of said Elector was or was not tainted by force or fraud at the local poll in the district of the State which appointed him. These are confessedly extraordinary powers, and it is only necessary to say of them here that, resting upon not even a fair implication, their assumption is clearly extra-constitutional, allowable, if at all, as the "war-power" was, when the nation's life can only thus be saved.

The Constitution was designed to guard very carefully the mode of a Presidential election, and its provisions may be regarded as very exactly framed for that end. If, therefore, Congress, in assuming this

* Chapter xiii., "1857."

unlimited power, are acting under its provisions, the result will doubtless be peace and harmony in the nation, and a proper freedom from the influence of intrigue and corruption; if the assumption is without warrant of law, the reverse must inevitably ensue,—doubt, difficulty, danger, and unmistakable evidence of corrupt practices.

Our premisses being correct, as they seem to be, the political history of the last ten years of this nation is a sad proof that the exercise of this power by Congress is an unwarranted usurpation.

CAUSES OF THIS CHANGE OF VIEW.

As it is quite easy for the observing student of the "Annals of Congress" to trace, almost step by step, the gradual retrogression of sentiment from the original usage, which selected the President of the Senate, to the latest claim of Congress to plenary authority over every ballot-box in the land, so it is not difficult to define the chief reasons which have led up to existing opinions, as they display themselves in practical operation at various stages of the progress.

The convenience of using the tellers, present at the Count as the representatives of Congress, to perform the mere clerical work of inspection and enumeration, induced the President of the Senate to confide a copy of the certificates to their charge from which to make their "lists"; then, to hand them both sets of certificates, that they might be compared in briefer time; next, to direct them to read the contents of the certificates, as being a mere clerical duty; and again, to have them publish the votes when they were summed up; the record of all these acts, without the reasons for them, becoming authority to subsequent tellers, who based their own infrequent duties on it.

It is not surprising, therefore, that we come at length to find the tellers the sole managers of the Electoral Count, as being appointed for that purpose, and the only students in Congress of the customs prevalent on prior occasions. For years no canvass of the electoral votes excited a special contest, until these proceedings became mere formalities, and the true significance of their customs, copied by each successive set from their predecessors, disappeared from the knowledge of even the tellers.

Let us remember how great a bar to accurate information were the four years intervening between each election, particularly when there

was no specially close popular vote; and how readily the extraordinary occasion of the Count would arise and pass without notice by Congressmen as a high prerogative, amidst their absorbing political struggles. An illustration of this occurred in 1836 and 1876 in the appointment, by a number of the States, of officials of the United States as Presidential Electors, in violation of a plain provision of the fundamental law, and in evident ignorance of their duty in the premises.

Again, this while the slowly changing public sentiment ramified into every corner of the country, and obtained a lodgment in the minds of men who were to be the people's future Representatives. They entered the halls of legislation often with no definite idea of the constitutional powers of Congress, or, as often, with an erroneous one. Impressed with a sense of their own importance, when the season of Counting had returned they were ready to adopt any system consonant with a due regard to their own unquestionable dignity.

Congressmen are but men at bottom, and, as the records abundantly demonstrate, often a surprisingly ignorant body of men in the performance of their official duties.* To such persons the solemn "declaration" by the President of the Senate of the President-elect was startlingly autocratic, and smacked of despotism. They forgot, or did not know, that it was a custom established by the first Congress that ever sat; and when they discovered it, to remedy its baneful influence, they inserted a special clause in one of their resolutions authorizing the tellers to "count the votes," who heretofore had never been appointed but "to make lists of the votes, as they were declared by the President of the Senate."†

Perhaps one of the chief reasons of this change arose from the fact that the right of canvassing the votes has never been claimed by a President of the Senate for political purposes. There has been more than one opportunity, but, even down to the Count which has just transpired, that officer has invariably done his duty as an honest man. Conceding that the Fathers intrusted any necessary power of canvassing to the President of the Senate, the result of their confidence in him has more than amply shown the wisdom of the selection. Had

* Chapter viii., "Opinions of Lawyer-Statesmen."

† Appendix, "1789," *et sequitur.*

the Constitution devolved the same power on Congress in specific language, would the political history of the nation have proven its, wisdom there?

Another distinctive cause appears in the more lately developed, and only now fully matured idea, that the election of a President is a popular act, so intended to be by the Constitution, and the natural, legitimate and unsurrendered prerogative of the people. Under these solemn circumstances the people have certain rights, of course, which may be endangered by their State officials, and our Congressmen become the sentinels upon the walls to prevent encroachment on the citadel of the Constitution! A discussion of this question will transpire hereafter, and it need only be added here that the source of this erroneous opinion is back as far as 1803, when the XII. Amendment was proposed.

But the prime cause of the final assumption of the canvassing power by Congress, that which has all the while been operative, and which always will be active in default of specific law to disallow it, is the constant tendency of republican governments towards centralization. This is no theory, but a fact of demonstrable occurrence over and over again in the history of the world; and nowhere have the strides of the aggressive force been faster and longer than in the United States, under the very *ægis* of Liberty on the dome of the national Capitol, and within hearing of the Centennial bells re-echoing Independence.*

CONGRESSIONAL USURPATION.

In 1821, during a debate in the House upon the reception of the electoral votes of the State of Missouri, and just preceding a speech by Henry Clay, in which he made the first recorded claim of a *casus omissus*,† the following sentiment was uttered by Mr. Floyd:

“ We have been going on for several years accumulating power, until scarcely any is left but in Congress.”

* It may be conveniently noted here that the foregoing order of the several “Electoral Theories” is entirely consistent with the necessary conditions of the case. The first could not reasonably have changed into the third at a bound, for that would have required too bold an act of usurpation. But Congressional lust of power has always been insidiously persistent, and it seized the suggestion of a *casus omissus* as a temporary bridge, and thus got over safely into the final and full fruition of its hopes, *an ex necessitate rei*.

† Appendix, “Annals of Congress,” 1821.

If that was true in 1821, with how much greater reason may it be asserted of the national Legislatures which have sat since 1861! Since the latter date, the extraordinary emergency in which the nation found itself, the herculean exertions which it was compelled to make in preservation of itself, and the exigencies of state which arose under the victory finally won and the ensuing peace, have imposed on Congress an authority which has carried captive even the better judgment of their leading statesmen. It is not unwarrantable to say of some of them, taking the evidence of the bare record of their speeches, that, knowing the truth, they have deliberately perverted the electoral provision to the baser uses of a political machine.*

As the immediate result of this usurpation came the first dispute over a State election in 1865, and the first "double return" of Presidential votes in 1873; whilst in 1876 the State elections were manipulated from the national capital, and dual returns procured in the interest of one of the candidates in order to secure his election.† The Houses are advancing *celeribus pedibus* to a sovereign authority over the Constitution itself!

Were the American people to stop a moment in their absorbing pursuit of the good things of this life, and take a retrospective view of the situation at the foundation of this government, and of the change which ninety years of political life have wrought in it, they must surely be startled from their present indifference. The time may come, if the existing course be held, when the principle laid down so carefully by the Fathers, of the absolute independence of the local State governments, will demand their intervention, as did that of the Federal Union in 1861.

But the mutterings of a coming storm of dissent are heard in the resolutions offered in the Rhode Island House of Representatives, February 5, 1877, which explain themselves only too well:

"*Resolved*, That all persons, filling the offices constitutionally created by the laws of the several States, are not subject to answering in any way, respecting the manner in which they execute the duties of those offices, to the Government of the United States, or to any branch

* *Ad. ex.*, Chapter xii., "The Bill of 1800," "of 1824," and "of 1875-6."

† Other examples of Congressional usurpation, Chapter iii., "The Meaning of 'State.'"

thereof; and that the official records of such officers are not subject in any way to examination or control of the Federal Government.

"Resolved, That the recent arrest and imprisonment of members of the Returning Board of the State of Louisiana by authority of the House of Representatives of the United States, and the call for the production of the records of that Board before a committee of such House, under the claim of a right to inquire into the doings of that Board, is a gross violation of the reserved rights of the several States, and that a due regard to the preservation of our own rights requires us to protest against it."

Our consideration of the causes tending to produce the change in public opinion regarding the Count of the electoral votes, may be fittingly concluded by a summary view of Justice Story upon the chief one of them ; it is advanced in his discussion of the "Executive Article" of the Constitution, and relates back to a complete exposition of the subject in the earlier commentaries :

"The tendency of the Legislative authority to absorb every other has already been insisted on at large in the preceding part of these commentaries, and need not be here further illustrated. In governments purely republican, it has been seen, this tendency is almost irresistible."

But again he says immediately afterwards, in a careful consideration of the Electoral System,—

"The scheme, indeed, presents every reasonable guard against these fatal evils to republican governments."

So we believe, after much examination of both the spirit and the letter of the Constitution. And further, we hold it to be demonstrable to any candid mind that pursues the subject thoroughly, that the language of that instrument is a specific definition of all the rights and powers granted, and of their proper executory officer, as originally was held and as should be maintained to-day.

CHAPTER II.

SPIRIT OF THE SYSTEM.

"The offspring of your own choice, uninfluenced and unawed, adopted upon full investigation and mature deliberation, completely free in its principles, and in the distribution of its powers uniting security with energy, it has a just claim to your confidence and your support."—GEORGE WASHINGTON.

CAREFUL CONSTRUCTION OF THE SYSTEM.

THE prime object of all interpretation is to ascertain the spirit, the true substance, of the instrument under examination. To the critical or hypercritical mind the letter of the law may falsify its spirit unintentionally, a later definition given to a word may change its former common import, or a slowly varying popular custom may at length provide an ambiguity for a phrase which was at first exact and clear.

It is probable that all these causes concur—some of them, as has been shown—in diverting modern perception from the true intent of the electoral provisions.

Therefore, in analyzing the subject, our first duty is to become acquainted with the spirit of the System, the end and object for which this unique provision was designed. We are fortunately not remitted here to the naked letter of the instrument, nor need time be consumed in evolving the true meaning from it. For we have clearly and emphatically set forth by the authors of the Constitution, by its earliest and ablest defenders, and by its wisest commentators since, the exact scope of the Electoral System, so that doubt on this point must be the result of wilful ignorance.

And it is at the outset of prime importance that we obtain a clear conception of that intendment which shall go with us in the examination of words and phrases as our guide, a lamp to lighten their obscurities, and a standard, furnished by the architects with which to test the letter of their handiwork.

It may be well just here to recall the fact that the construction of the Electoral System was the source of no little anxiety and care to the Convention of 1787. Through nearly four months of unremitting labor it was present with them and slowly taking its existing shape, so that it became the crowning work of the Convention.* No wonder, when it had thus carefully passed through the alembic of such able minds, that Hamilton pronounced it almost perfect!

James Wilson, one of its framers, sustaining the Constitution before the convention of Pennsylvania in 1788, which was considering the question of its ratification, remarks specially upon this feature of it, as is noted in "Eliot's Debates":

"The manner of appointing the President I find is not objected to, therefore I shall say little on that point. But I think it well worth while to say this to the House, how little the difficulties, even in the most difficult part of the System, appear to have been noticed by the honorable gentlemen in the opposition.

"The Convention, sir, were perplexed with no part of the plan so much as with the mode of choosing the President of the United States."

Here is specially instanced the mode or manner of the election—the details of the general scheme—as the object of cautious and perplexing inspection, in order that the end in view might be definitely reached through the provisions framed. It is not possible to hold that these men were fools, and declaimed hap-hazard on the point; in fact we know the contrary, and that they were scrupulously exact in using language. Therefore, we must believe with them that, at that time, the electoral clauses were perfectly adapted to the end in view; and that any change since then proceeds from wrong interpretation here, and not there where their phraseology had an exact and well-known significance.

The very construction of the electoral clauses is confirmatory evidence of the care with which they were drawn. They contain more words, and none superfluous, than those granting to Congress their almost unlimited powers, and yet they relate to but one topic, whilst the others cover dozens.

"Madison's Debates" outline the exhaustive discussion which the

* Chapter xi., and Appendix, "Journal of the Convention."

subject underwent in the Federal Convention, and, remembering that these men were architects in active duty, and not mere critics or inspectors, we must presume them perfectly familiar first or last with the case in hand. In every other devolution of power we find them to have been scrupulously exact, and every consideration warrants the opinion that they designed to be and were so here. Therefore, when we have presently observed the end they had in view, the preponderance of credence must first lie with the text, and proof must issue to the contrary before it can be overthrown.

Furthermore, to hold that such men did not anticipate dissension upon the subject of the canvass of the electoral votes is too preposterous. Having deliberately limited the qualifications of the President and of the Electors, and surrounded and hedged in the whole System with guards as relates to time, place, and purpose; having even discussed the effect of the death in one term of the President, Vice-President, President of the Senate, and Speaker of the House, and other collateral and possible problems; to assume now that they overlooked the most salient point in the scheme, that which was most vulnerable, as history shows,* to the attacks of unscrupulous partisans, is to discredit the evidence of one's senses as he notes the perfection of every part of the Constitution, and knows that it is due altogether to the political and legal foresight of its constructors.

But it is still more incredible when we remember, as the Journal of the Federal Convention demonstrates, that there was up at one time for consideration the very question of who should officially receive and count the electoral votes, and that it was decided by fixing the clause as we find it.† That decision, the well-known phraseology of the instrument, was intended as a final settlement of the question in dispute to-day; and to claim that there is a *casus omissus* after knowing that argues a total inability to comprehend the elementary logic of history.

THE SCOPE OF THE SYSTEM.

It was no Utopian scheme that the Fathers endeavored to invent, but one whose operation should procure a practical solution of two

* *Vide "Amendment in 1798" and "The Bill of 1800"* in Chapter xii.

† Chapter xi., "Amendment and Acceptance."

well-understood and prevalent obstacles to the stability of the Government they were constructing.

A Chief Magistrate was to be appointed, and the principal question,—the only question in fact, since all others were subordinate,—was, Shall he be appointed by the legislature or by the people? whilst the two dangers, hinging upon these two modes of choice, were intrigue, on the one hand, involving a wide-spread corruption, and popular excitement on the other, merging most likely in anarchy.* The problem was pregnant with difficulties, against which only the most patient investigation could provide; and in the hands of the Convention favor for and against one and the other swayed back and forth, until the day that our present electoral scheme was laid almost complete before them, when opposition ceased at once, and there was a universal assent to the wisdom of the plan and the comprehensiveness of its purview.

For the Fathers were profound students in human nature, as their work demonstrates, and they knew too well its weaknesses and its temptations, which they must expect and carefully provide for. They were learnedly versed in ancient and mediæval history, its faults and its failures, and were statesmen and political philosophers in the very best sense of educated ability. Besides which they had had the severe training of the War of Independence, and the almost severer experience of ten years in the Confederation. So that when they grappled with the problems of "a better Union," they did it as men seasoned to their work, wary in each step of their progress, and exact in every definition of a power.

Let it be fully comprehended then, that the single purpose of the Electoral System's unique provisions was to prevent intrigue and popular excitements, that the means used were the deprivation of both the Congress and the people of all power over the election, and that every word and phrase of the text was provided with that end in view.

And now for a moment let us remember that for four months following November 7, 1876, the nation was stirred to its depths by an excitement unsurpassed in this regard, and threatening anarchy or open revolution; and further, that in the concurrent developments of

* Chapter xi., "Election of President by Congress," and "An Electoral System Proposed."

Congressional investigations, the most shameless intrigue and corruption transpired as used to influence the Electors. These two events occurring,—the very possibilities against which the Constitution so carefully provided,—prove that something must be wrong in our usages under the electoral provisions; we need no stronger proof. And it must be a changed usage, a later and incorrect interpretation of the law, for it did not occur when the Fathers supervised these Presidential elections.

The problem is solved at once, and the reason shown of both the corruption and the excitement, when it is noted that it was not the Constitution nor the law, but the two Houses of Congress, which were expected to count the votes and determine the President-elect. And the solution is enforced by the historical facts, that the only two other elections in our annals which have proved dangerous to the peace of the nation were in 1801 and 1825, when they fell into the hands of the House. This is, in truth, the only weak spot in the scheme, and it exists solely because the necessities of compromise in 1787 required a departure from the spirit of the System.*

Were any other tribunal than Congress itself to pass on this disputed point, the circumstantial evidence herein involved would be enough to condemn Congressional assumption of the canvassing power forever.

An investigation into the true purpose of the Electoral Count cannot grasp too clearly then the fact that the immediate end and aim of this unique System is to keep a Presidential election entirely out of reach of both the people and the Congress, except in the specific case of a non-election by the Electors, when the House of Representatives are directed to elect "immediately." Its importance lies herein, that the gist of the question in dispute to-day is the right of Congress to interfere before that case arises, by force of an implication latent in a confessedly ambiguous phrase. While the design of the scheme may not, by reason of any sovereign virtue in it, defeat such claim if really resting on an implication, nevertheless it is a prime factor in any analysis of language which seeks to demonstrate its actual, though recondite, meaning.

* Chapter x., "Hamilton's System," explains the cause, and the progress of his compromise is distinctly marked in Chapter xi.

TO AUTHORS AND COMMENTATORS.

It would be unnecessary to present all the proofs at hand to establish the true philosophy of the electoral scheme; they are very numerous throughout the writings of the Fathers and the records of the Convention. From them are selected a few, which will serve to prove upon how broad and strong a basis the assertion is made, when the proceedings of the Convention of 1787 are understood hereafter the facts in the case will be finally demonstrated.

Alexander Hamilton remarks in the "Federalist," in discussing the Electoral System,—

"Nothing was more to be desired than that every practical measure should be opposed to cabal, intrigue, and corruption."

"Another and no less important desideratum was that the Executive should be independent for his continuance in office (referring to all but the people themselves.)"

James Wilson, of Pennsylvania, one of the persistent advocates of the scheme in the Convention of 1787, as well as one of its chief opponents out of it, is reported by Eliot as saying,—

"To have the Executive office dependent upon the Legislature would certainly be a violation of that principle so necessary to the freedom of Republics, that the Legislative and Executive should be separate and independent."

Charles Pinckney, who had been a member of the Federal Convention, and one of whose specific sources of knowledge is shown in the preceding extract, in addressing the Senate in 1800 upon the subject of the Electoral System, is reported as using the following forcible language:

“ To give to Congress, even when assembled in convention, a right to reject or admit the votes of States, would have been so gross and dangerous an absurdity as the framers of the Constitution never could have been guilty of.

“ How could they expect that in deciding on the election of a President, particularly where such an election was strongly contested, party spirit would not prevail and govern every decision ? Did they not know how easy it was to raise objections against the votes of particular elections, and that in determining upon these it was more than probable the members would recollect their sides, their favorite candidate, and sometimes their own interests ? Or must they not have supposed that in putting the ultimate and final decision of the Electors in Congress, who were to decide irrevocably and without appeal, they would render the President their creature, and prevent his assuming and exercising that independence in the performance of his duties upon which the safety and honor of the government must forever rest ? ”

There has never been delivered in either of the halls of Congress a speech touching this provision more replete with the genuine spirit of the Constitution, more definitive of the exact scope of the Electoral System, than that of March 28, 1800, by Charles Pinckney.* It is a masterly exposition of the subject, exhibiting, alas ! a too prophetic insight into the probabilities of Congressional interference with the votes, though it has taken seventy-seven years of political scheming to demonstrate it.

“ The Madison Papers,” in their notes of the Federal Convention’s debates, record, when the electoral section was first reported to that body by the select committee which framed it, the following pertinent proceedings :

“ Mr. Randolph and Mr. Pinckney wished for a particular explanation and discussion of the reasons for changing the mode of electing the Executive.”

[That is from an election by Congress, which both these gentlemen had been advocating.]

“ Mr. Gouverneur Morris said he would give the reasons of the committee and his own :

* Appendix, “ Pinckney’s Speech.”

"The first was the danger of intrigue and faction if the appointment should be made by the Legislature. The next was the inconvenience of an inflexibility required by that mode in order to lessen its evils. The third was the difficulty of establishing a court of impeachments, other than the Senate, which would not be so proper for the trial, nor the other branch for the impeachment of the President, if appointed by the Legislature. In the fourth place, nobody appeared to be satisfied with an appointment by the Legislature. In the fifth place, many were anxious for an immediate choice by the people. And, finally, the sixth reason was the indispensable necessity of making the Executive independent of the Legislature."

Remembering that an election directly by the people, to which the fifth reason refers, had been advocated early in the sessions of the Convention,* debated, and dismissed as exceedingly impolitic and dangerous, it is clear that this statement means that, rather than have Congress elect the President, many members would prefer a popular election, with all its dangerous possibilities. So that every reason above narrated turns on the absolute impropriety of empowering Congress with the control of an election, and a more convincing proof of the intrinsic spirit of the System, and of our construction of it, could not be demanded.

But lest it be thought that these opinions might not be patent to strictly legal and unprejudiced minds, and at a later day, the following extract may be cited from Lecture XIII. of Chancellor Kent's "Commentaries":

"Had we referred the choice of the President to Congress, this would have rendered him too dependent on the immediate authors of his election to comport with the requisite energy of his own department; and it would have laid him under temptation to indulge in improper intrigue, or to form a dangerous coalition with the legislative body, in order to secure his continuance in office.

"All elections by the representative body are peculiarly liable to produce combinations for sinister purposes, and the Constitution has avoided all these objections by confiding the power to a small number of select individuals in each State, chosen only a few days before the election, and solely for that purpose."

* Chapter xi., "Election of President by Congress."

And Judge Joseph Story, in Chapter XXXVI. of his "Commentaries on the Constitution," descants as follows on the theme:

"The scheme indeed presents every reasonable guard against these fatal evils to Republican governments.

"The appointment of the President is not made to depend on any pre-existing body of men, who might be tampered with beforehand to prostitute their votes; but it is delegated to persons chosen by the immediate act of the people for that sole and temporary purpose. All those persons who, from their situation, might be suspected of too great a devotion to the President in office, such as Senators and Representatives and other persons holding offices of trust or profit under the United States, are excluded from eligibility to the trust.

"One motive, which induced a change in the choice of the President from the National Legislature, unquestionably was to have the sense of the people operate in the choice of the person to whom so important a trust was confided.

"Another motive was, to escape from those intrigues and cabals, which would be promoted in a legislative body by artful and designing men, long before the period of choice, with a view to accomplish their own selfish purposes."

In concluding this branch of the subject, it may be added that, it being clear that the intent of the Electoral System is to prevent Congress from controlling a Presidential election, it is pertinent to inquire, What intrinsic difference is there between electing immediately by a joint ballot, and electing meditately by canvassing the electoral votes? Is it not obvious that Congress, through its "Electoral Commission" in the late canvass, really controlled the election as fully as if the two Houses had been clothed by the Constitution with plenary power of appointment?* And is it not all too clear that their inspiring spirit was—not justice, but—the rankest, bitterest extract of partisanship?

Schenck
X

THE PLAN OF THIS ANALYSIS.

The plan of this investigation is founded on a comprehensive presentation of the philosophy of the Electoral System at the outset, which has already been made.

It then proceeds upon the rational presumption that the very texture

* *Vide* the record, Appendix, "Annals of Congress," 1877.

of the Constitution must be patterned by this vital principle,—that the spirit of the instrument and its language are its warp and woof, by which it must be recognized and judged.

It expects, therefore, that our political history will demonstrate that, when Congress have obeyed the behests of the Constitution in this regard, the electoral machinery has worked quietly and perfectly; and that whenever they have violated this principle, disorder, disquiet and danger have ensued. If these things be proven, then the success or failure of the original scheme will properly rest on the shoulders of Congress, where the Constitution designed to lay it, when it commanded them to frame efficient laws to execute it.

In our analysis of the phraseology of the instrument, the many theories of modern times must be discarded,—all of them, in fact, that have been or can be made. The electoral provisions were intended to establish a system of procedure in accomplishing a certain end. To invent a theory, therefore, especially one that may be based on erroneous ideas of a recent growth, and to examine the Constitution by its guidance, is as illogical and irrational a labor as to pursue an *ignis fatuus* into the depths of a tangled fen.

And all later precedents must be ignored, as being only possible stumbling-blocks in the way of a fair progress. It is as easy for an ignorant as for a wise body to make a precedent, and those recently constituted by Congress do not bear evidence of sublime capacity. Furthermore, no precedent, as to this provision, has ever been regarded by the Houses, when it was to the interest of a dominant party to discard it. What value can possibly be attached, for instance, to the precedent of investigation into State electoral frauds in 1873 by a regnant party, which denies the validity of such evidence in 1877? Or, to the objurgations of the opposition at the former act, which at the latter rested all its political hopes upon such evidence? Or how shall we construe the latest precedent in point, wherein Congress by an overwhelming majority declare their right to canvass the electoral returns, whilst the "Commission," which they had appointed for that purpose, declare the absolute unconstitutionality of a canvass?

Party affiliations, too, must be forgotten, for they are too apt to beget a prejudice which blinds the mental eyes to truth. In such a case we are to sit in council as high-minded judges, rendering righteous judgment, and not as vulgar partisans, joined to our idols.

Our further plan involves the taking of the naked language of the Constitution, and ascertaining first its exact and legal significance; then a comparison of that meaning with the spirit of the Electoral System, as heretofore laid down; next, an examination of the Journal of the Convention of 1787, in support of our conclusion; next, the production of the records of other constitutions and customs of confirmatory value; a collation of the contemporaneous constructions of the Electoral System by documentary and verbal evidence; an investigation of the earliest authenticated usages of Congress; then the exposition of the early Acts of Congress constructed by the Fathers in execution of it; and, finally, the negative method of proof, by showing the errors and the conflicts of proceedings held in violation of the spirit of the law. These, if conducted discreetly, will be evidence so cumulative and so exhaustive of the subject, that our conclusion in favor of the points supported by them should be clear and satisfactory.

SOME RULES OF INTERPRETATION.

It must be observed that the Constitution is couched in general language, and that it contemplates the enactment of suitable laws by Congress, in order that its provisions may be duly executed; we cannot expect to find in it the detail requisite in complying with its broadest stipulations.

"The framers of the Constitution must be understood to have employed words in their natural sense, and to have intended what they said; and, in construing the extent of the power which it creates, there is no other rule than to consider the language of the instrument which confers them, in connection with the purposes for which they were conferred."^{*}

It must be held that the Framers of the Constitution intended to employ language which should express their true intent; that they did employ the language which they believed conveyed their meaning; and that, therefore, the force of all seemingly doubtful phraseology should be determined by the spirit of the instrument itself.

Judge Story, in his Commentaries, sums up the whole subject of legal construction by the following comprehensive precept, beyond whose lucid definition we shall not be required in our investigation to go:

* Supreme Court, 9 Wheaton, 188 and 189.

"The first and fundamental rule in the construction of all instruments is, to construe them according to the sense of the terms and the intention of the parties."

And the importance of the method of investigation here proposed is not only patent to-day, from the conflicting opinions extant, but was recognized fifty years ago by the sage James Madison, so prominently connected with the origin of the Constitution.* Writing to Henry Lee, June 25, 1824, during the pendency in Congress of the very question now before us, he pregnantly observes,—

"I entirely concur in the propriety of resorting to the sense in which the Constitution was adopted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable, more than for a faithful, exercise of its powers. If the meaning of the text be sought in the changeable meaning of the words composing it, it is evident that the shape and attributes of the government must partake of the changes to which the words and phrases of all living languages are constantly subject. And that the language of our Constitution is already undergoing interpretations unknown to its founders, will, I believe, appear to all unbiased inquirers into the history of its origin and adoption."

* *Vide* Madison's letter, Chapter xi., "The Convention of 1787."

CHAPTER III.

APPOINTMENT OF ELECTORS.

"The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, has been evinced by experiments, ancient and modern, some of them in our country and under our own eyes."—**GEORGE WASHINGTON.**

RESERVED RIGHTS OF THE STATES.

"**EACH** State shall appoint, in such manner as the Legislature thereof may direct, a number of Electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an Elector."

In discussing the authority of the State in the premises, we must not be deluded by any false, nor yet by any sentimental, notions. A State is not a sovereign constituent of this Union, as has been decided by a sterner arbitrament than that of the law; but, in the Union, she is a sovereign power within her own domain,—*imperium in imperio*.

The Constitution is clearly a grant of limited powers to the United States; that is, such powers as are vested in them by express terms, or by necessary implication. Therefore of necessity all other powers are retained by the people or the States respectively; there could be no other legal construction of the instrument. But at the institution of the government, both the people and the States were jealous of their rights to the verge of a disapproval of the Constitution, because of its silence on this head, and they demanded the specific protection of amendments for the rights which they had not granted, and which subsequently came to be known as "the reserved rights."

Accordingly at the first session of the 1st Congress certain amendments, covering the points indicated, were proposed to the States,

ratified by them, and subsequently incorporated under a preamble which sets forth specifically their end and aim, as follows :

"The conventions of a number of States having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added ; and, as extending the ground of public confidence in the Government will best insure the beneficent end of its institution ; therefore Congress, according to the constitutional mode, recommended to the States, and their legislatures did adopt, such of the amendments as are now officially directed to be annexed to the Constitution."

Observing that the object of these amendments was "to prevent misconstruction and abuse of the powers" of the Government, we proceed to two of them which are pertinent, viz. :

"IX. The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

"X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

There can be no avoidance of the effect of these specific declarations, except by a total disregard of the binding force of the Constitution.*

The system of dual governments, National and State, which our Republic presents, makes necessary a careful distinction of the authority of each in executing the Constitutional provisions, and it is here where these amendments are of value. Both the people and the States are called upon to bring into being the two Houses, but only the States can participate in the election of a President. Just where the authority of the State over the election ends, and that of the general Government begins, is a question which ought not to be difficult of solution,—which is not, in fact,—under the exact phraseology, and yet one concerning which there has been from time to time more or less conflict of opinion.

In the interpretation of the electoral clauses we have to deal not only with an ordinarily guarded power, but with an extraordinary and unique provision, whose very existence is an evidence of its exact construction ; and we have the proofs also, before adverted to, of the care-

* Appendix, "Pinckney's Speech."

ful consideration and preparation which it underwent.* The force therefore of its language is in effect doubled, and its phraseology may be considered as not only to be interpreted in the usual method, but as being specially selected to convey its full meaning in the strongest manner.

When therefore we find the simple language, clear, concise, and exact, "Each State shall appoint" certain Electors, there is no room for doubt as to the precise intendment of that grant of power. The appointment of the Electors is vested absolutely in the States.

No. XXVIII. of the "Federalist," after showing the derivation of the House from the people, and of the Senate from the States, "as political and co-equal societies," advances the foregoing view, as follows:

"The Executive power will be derived from a very compound source. The immediate election of the President is to be made by the States in their political characters. The votes allotted to them are in a compound ratio, which considers them partly as distinct and co-equal societies, partly as co-equal members of the same society."

THE MEANING OF "STATE."

The exact definition of the word "State," in the electoral clauses, has never yet been made. At the institution of the Federal Government, it was freely employed to represent a well-known fact, viz., a sovereign Republic, occupying certain territory within the United States; and eleven such Sovereignties, by their citizens, framed the Constitution and adopted it. Surrendering a portion of their powers thereby, their very essence was changed by force of it, and they became new creatures under the Union.

A State is of course a political being, as has been decided categorically by the courts. New States are provided for by the law, and Congress are authorized to admit them; so also are Congress directed to "guarantee a republican form of government" to them. Congress therefore have the authority to decide what shall constitute a State, and when it shall be so constituted, and to define the *status* of a State within the Union; but this has never yet, assuredly by some unhappy oversight, been done.

* Chapter ii., "Careful Construction of the System."

More than once electoral votes have been offered by a *quasi* State, and the question raised in Congress whether they were presented by a "State" within the meaning of the Constitution. The result is that Congress have assumed the power of declaring their *ipse dixit* on any case which arises, which was not the intendment of the organic law. Furthermore the custom offers the opportunity to decide unjustly for political ends, to the deprivation of the rights of a constitutionally organized State.

The tendency of Congress to grasp extreme power, and to use it for political ends, is illustrated by its action on this question.* At the Opening of the Votes, objections were made, on the ground that they were not States, to Indiana in 1817, to Missouri in 1821 and to Michigan in 1837; when Congress resolved, in its usual dilatory way at that period, to neither receive nor reject them, but to report their votes. In 1865 the votes of Tennessee and Louisiana were rejected, though President Lincoln had recognized them as States, which was followed in 1869 by the rejection of the votes of Georgia; and this on the ground that they were not States of this Union, notwithstanding that a bloody war had just been fought to demonstrate that they were.

Pending the canvass of the electoral votes in 1877 it was seriously suggested by many politicians that the Democrats in Congress should object to the returns of Colorado, on the score that she was not a State, as a legitimate political stratagem to defeat the Republican candidate.

As the law stands then, if Congress assume the right to determine the existence of a certain "State" at the Opening of the Electoral Votes, they violate the whole spirit of the System, as set forth in Chapter II.; whatever authority of determination they may have, they are effectually prevented from employing it in that emergency. Nevertheless the emergency may arise, and it is not wisdom to trust the subject to fair treatment at the hands of a possibly unscrupulous majority. There seems to be no reason why a law shall not define the word, so that hereafter a State will have an exact, perpetual and universal significance, and not be subject to the *fiat* of a partisan body.

In common parlance the word "State" may signify either the terri-

* Chapter xiii., "1817, 1821, 1837, 1865, and 1869."

tory, the people or the government, but its political meaning under the Constitution includes all three; so that in general it consists of a certain number of citizens of the United States, inhabiting a given territory and united under a republican form of government.

In its relations with the Federal Government, however, it is limited more narrowly than this, as appears from the express terms of the Constitution. Art. I., Sec. II., 1st Clause, particularizes "the people of the several States"; Sec. III., 2d Clause, refers to "the legislature of any State"; and the Executive, Judiciary, and Electors of a State are also specifically used. By force of this phraseology a "State" is wholly different from her people, her government and her judges, in her relations with the United States; and the term may be more exactly defined as "an integral part of the Union, having a republican form of government," which Congress are directed to guarantee.

This Union is indissoluble, and therefore a member of it once is always a member, and an active one so long as it retains its political organization; and it possesses the right of representation in the Legislature and in electing a President, and all the rights and privileges appertaining to other members, so long as it is in harmony with the Constitution of the United States. The War of the Rebellion, prosecuted in defence of this fundamental principle, has determined it finally.

When, therefore, the Constitution provides that "each State" shall appoint Electors, it means "each distinct member of the Union" only; and it is just here that Congress, the final authority in the case, owes a duty to the nation of defining categorically what is a "member of the Union." The question was raised at the close of the war, was debated from the stand-point of party policy rather than from that of statesmanship, but was left unsettled, except by the precedent of an arbitrary and remorseless reconstruction policy.*

THE STATE IS NOT THE PEOPLE.

One thing is fixed, however, positively. It is neither the government nor the people that is the "State," within the purview of the Constitution: these two elements are essentials in her organization, as

* *Vide* the definition of a State in "A New Law," sec. 1, Chapter xiv.

are the head and heart in that of the human being ; but they are not the State *per se*, as the head and the heart are not the man.

There is much evidence of this at hand. In the same clause which delegates the appointment of Electors to the State, the "manner" of that appointment is delegated to the "legislature thereof," whereby the legislature is so far exalted above the State. The Governor of the State and her people are nowhere mentioned,—a very significant fact, when we remember that it was proposed in the Convention of 1787 to place the election of a President in the hands, first of the people, next of the legislatures, and thirdly of the Governors of the States, and that each proposition was rejected, and the rejection emphasized by the substitution of the word "State."* The conclusion is clear, that to neither the people nor to the State government was the right to representation by Electors given.

This point is urged at length as a means of gauging the modern theory that "the people elect the President," and that when the popular vote, under our existing system, is cast, "it must have its full weight in steady progression from the local poll to the declaration of the President-elect in the presence of the two Houses." Hence comes the claim of Congress, as the Representatives of the people, to see that the "popular vote" is not fraudulently annulled, or the "will of the people" thwarted. The thought runs through the daily journals, it rings from the throat of the political demagogue, and it too often escapes from the lips of the *quasi* statesman in Washington. But there is not the slightest foundation for it in the Constitution ; it is a radical wrong on the spirit of the System,† and, though insidious in its approaches, like all sophistry, it is put to rout by the simple logic of the text.

Were a Presidential election based on the popular will, our majority rule would be operative at once ; whereas it may often happen that a minority of the people only are represented. In 1825, Jackson had 50,000 more of the popular vote than Adams, who, nevertheless, became the President ; in 1849, Taylor had 50,000 less than half the popular vote ; in 1857, Buchanan fell 200,000 short of half the popular vote ; in 1861, Lincoln's vote was 500,000 less ; and in 1877 Hayes had nearly 300,000 votes less than his competitor. These facts,

* Appendix, "Journal of the Convention."

† Chapter ii., "The Scope of the System."

well enough known, ought to dispose of the "popular will" theory; and they do, with all but partisans and demagogues.

There are other concurrent facts to support our position, drawn from another source. In 1789 the State of New York appointed no Electors, and hence was not represented in the election of George Washington; in the same year the other States were entitled to 73 votes, and cast only 69, as the record demonstrates; in 1793 the people lost three electoral votes; in 1809 Kentucky lost one vote; in 1865 Nevada lost a vote, whilst those of Louisiana and Tennessee were rejected; in 1869 the votes of Georgia were not counted; in 1873 the votes of Arkansas and Louisiana were rejected.* These facts explode the "popular" theory effectually, since it is manifest that not only may a national minority elect a President, but that oftentimes the citizens of particular States are not represented at all, or only in part.

And, furthermore, the people are stopped from claiming the right, by virtue of their own act. All powers under the Constitution proceed from the people, as the Preamble sets forth; and, conceding their original possession of the right to choose a National Executive, they have vested it in a special body, called the Electors. They have not even retained the right to appoint the Electors, but have explicitly vested that in the States; nor the right to control the manner of appointment, which is vested in the State Legislatures.

To cement the contract they add the X. Amendment to the Constitution, whereby all powers not expressly vested are declared reserved, and so conclude themselves from any subsequent claim over vested powers more effectually; and by the IX. Amendment, declaring all rights "not mentioned" to be retained, they as strongly affirm that all rights mentioned they have fully transferred to others. One of those "rights" and one of those "powers" is the right of the States to take the place of the people in being represented at a Presidential election, and the power of the States, in the stead of the people, to appoint the Electors to represent them.

When, therefore, it is gravely objected in Congress, under their late rules, to the reception of a certificate, as in the recent Florida case, that the Electors were designated by the Canvassing Board "with the

* *Vide Chapter xiii. for these facts under their respective dates, and Appendix, "Annals of Congress."*

intent to defeat the will of the people," its absurdity is at once apparent; and the reply of the United States must be: The will of a higher authority than that of the people of a State, the National will, as expressed in the organic law, is, that the State alone has the right and authority to appoint her Electors, and that therefore the people cannot be recognized by the national authorities.*

THE GRANT IMPORTS A PRIVILEGE.

The representation of a State in the election of a President, as has been heretofore adverted to, is a right, but in no sense a duty.† Therefore the text, "each State shall appoint," is not mandatory as to the representation, but only as to the "manner" of it, as shown in the qualifying phrase; the substance of the phraseology being, not "Each State shall be represented in the election,"—that is only a right appertaining to her,—but "Each State, if she wish to be represented, shall have power to appoint her Electors as her Legislature directs."

One proof of this is the fact of our political history, when, for example, as in the case of 1789, one State was not represented, and this at the first election under the Constitution. There was no special notice taken of its absence, and not even a record of it made at the Opening of the Votes; whereby the Fathers themselves emphasize the meaning with which they intended to endow that expression.

Furthermore, representation in electing a President is a privilege which comes to the State as a gift, for her own behoof, and not for the benefit of the Nation. Under the Constitution the chief Executive is elective by "a majority of all the Electors appointed," if the representation come from only one State in the Union. It not being either the people or the States who choose the President directly, but certain Electors, he is just as completely and legally chosen if three-fourths of either the people or the States refrain from participation in the service, as if they all engage in it; and a President so chosen is the Supreme Executive of the Union, the recalcitrant people or States included. This was illustrated in the election of Lincoln, in 1865, without the

* This point is further discussed in this chapter, page 66.

† For further elucidation of this point *vide Chapter xi., "The Electoral System Presented," Chapter xii., "The Bill of 1790," and "Pinckney's Speech," in the Appendix.*

aid of the rebellious States and their citizens, and it was determined conclusively by the victory of the national arms.

Next to the fundamental principle of the Constitution, the sovereignty of the people, is the principle of political "representation" in the government of the nation. It was the war-cry of the Revolution, and the policy adopted throughout by the Federal Convention in constructing the Constitution. "The people," divided into States, desired a duplicate representation in the national councils; therefore they gave to the citizens of each State the right of electing Representatives, and to the States the right of electing Senators; and these two bodies represent the Nation in enacting laws. The States and the people respectively enjoy these powers as rights of which they are seized; and, if either neglect, or refuse, to send representatives to Congress, no power can compel them,—their rights are ample in the premises.

But "the people" desired also a President to execute these laws, and they gave his election mediately into the hands of the States, to be regulated by the Legislatures thereof; he also is a national representative, and likewise of both the States and the people, for the Legislatures are the people acting through an organization. This right of the States to a representation in a Presidential election is the foundation of the Electoral System; it underlies every question that may arise concerning it, and explains every problem that may otherwise seem hard.

THE RIGHT IMPORTS PLENARY POWER.

This principle is so little alluded to in the ordinary examinations of the subject, that it will not be amiss to invite a more careful attention to it. Its force, its scope, and the consequences flowing from it, demand a special consideration.

Firstly, it adds to the arguments against the theory that it is the duty of the Nation to see that every State is fairly represented; being a privilege attached to the State, the representation, whether fair or fraudulent, is in her own hands, and not under supervision of the general Government. If the State shall please to appoint Electors, then it becomes the duty of the Nation to count their votes, for the State has a "right" to such a recognition; but that is the full extent to which the Constitution goes.

Representation, not being a duty, cannot be demanded by the na-

tional Government ; and only in the event that they could so control it, could the Government have authority to canvass it.

The State's right to this representation carries with it the authority to regulate it wholly ; the duty of the Nation to accept it involves a strict neutrality as to its quality.

Since the right inures to the State for her own behoof, the State must have full power to enjoy it and use it ; only in the event that it was given for the benefit of the Nation, could the general Government exercise authority over it.

The customary phrasing of the politicians is, The Government has a right to see that no frauds are committed in the election of a President,—that fraud vitiates the whole transaction ; and therefore that, fraud being shown in the appointment of a State's Electors, the President selected by their votes is tainted by it.

The fallacy here is so simple, that it is readily exhibited. The election of a President is made wholly and solely by the Electors. Now, fraud vitiates that election, as it does any other transaction, and into it the United States have authority to inquire. But, to go back of the transactions of the Electors, to see whether or not there was fraud in *their* election, is absolutely outside of national authority, and an invasion of the prerogatives of the State.* In their election or appointment is involved this right of representation, which has been set forth, and with that, it has been shown, the Nation must, by force of its relationship, be neutral.

Secondly, our position with reference to a non-popular representation is enforced. If a full representation of neither the States nor the people is required, it can only be because popular representation is not the system which the Constitution contemplated.

Thirdly, the grant of such a right is an investiture of the State with authority over all its incidents. A right to representation is absolute, as against any power except the sovereign one which gave it ; and it is without limitation, except in so far as the bestower may see fit to limit it. In this case the right comes through the Constitution, and no power but the Constitution can divest or modify it.

Let it be clearly perceived and closely adhered to in the discussion of this immediate point,—a supervisory authority over the State ap-

* A further discussion of this point appears at page 54.

pointment of Electors,—that, twist and turn and transform the argument as one may, back of every one of its false faces are the true features of a constitutional gift to the State of “a right to a representation,” which is absolutely vested in the recipient. This is the true and only sound basis for discussing the knotty questions which arise from it, and on this basis they adjust themselves consistently and harmoniously.

“APPOINT” DENOTES PLENARY POWER.

As if to place this question, which has been so much debated, beyond all dispute, the Constitution makes use advisedly of the simple and technical word “appoint.” It could scarcely have selected a stronger term to import the complete authority of the State. To appoint is “to fix, to ordain, to allot, to settle, to determine,” according to the lexicographers, and, in a single word, it conveys the meaning of a phrase which covers an investiture with plenary authority.*

For what, but absolute authority, can “fix” a thing, or “settle,” or “determine” it? The beginning and the end of the transaction are included in it, as the synonymes demonstrate.

The appointment of Electors, therefore, when they are selected by the people of the State, involves the power, full and final, of an election, canvass, determination, and declaration. Nothing less than this would comport with the State’s rights in the premises, and any other word devolving the power must have been construed as carrying the same legal force. Had it even been provided “each State shall elect” Electors, no extraneous party could have claimed authority to canvass the election. Add to this the fact that in the Convention of 1787 various schemes had been proposed and temporarily accepted, prior to the formation of our existing system, providing that Electors should be “elected” by the people, the legislatures, the governors, etc., of the States,† and that the Constitution advisedly discarded that word and employed the term “appoint,” and its force is made more apparent.

The full meaning of the word “appoint” is further very clearly exhibited in the investment of the President with such a power in

* *Vide page 55.*

† Appendix, “Journal of the Convention.”

particular cases. In Art. II. Sec. II., Clause 2, is the following, in the definition of his powers and duties:

"And he shall nominate, and, by and with the advice and consent of the Senate, shall appoint, ambassadors," etc.; "but Congress may, by law, vest the appointment of such inferior officers as they think proper in the President alone."

The proceedings contemplated here are,—a nomination which goes before the Senate, a discussion of it, a vote on the question of approval, a canvass and a declaration of the result, and a return of the same to the President, whereon he issues the commission, and so finally appoints. There can be no appointment if his hand and seal are not set to it. The large scope of the word is therefore clearly brought out by both this provision and the practices under it, and is in direct support of our construction of the same word, as used in a different, but parallel, instance.

The State's appointment is merely the method by which the right of representation is exercised, and yet the word conveys an unlimited authority as well. The argument is altogether so strong as to be irrefragable, by sheer force of the carefully selected phraseology which conveys the privilege and the power.

PROOF BY PRACTICE OF THE CONFEDERATION.

Hitherto the investment of the State with the right and power of "appointment" has been considered chiefly on its intrinsic merits; but there are others extrinsic which are of value, and which may be adverted to in further consideration of the subject.

That the Framers of the Constitution knew full well the significance of their language as to this appointment, and the plenary power which it conveyed, is supported further by the fact that such powers had been already enjoyed by the States, during a period of ten years before the Constitution was adopted. In Article IV. of the "Articles of Confederation," agreed to in 1777, the Congress was provided for in the following words:

"Delegates shall be annually appointed, in such manner as the Legislature of each State shall direct."

This extract proves that it was copied by the Convention of 1787 almost *verbatim*, and, unquestionably, with the intent of conveying the precise meaning that it had always had; and this is the chief

reason why there was so general an acceptance of the Electoral System of appointing a President, as we have learned from Hamilton and Wilson,*—it was exactly comprehended from long usage. Now, the full significance of the provision under the Confederation may be gathered from Article II. of that same Instrument, which was as follows:

"Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States in Congress assembled."

There is no mistaking the ring of this language, nor doubt that, since the Confederate States did not delegate to Congress the right of appointing their Delegates, they intended to exercise it themselves, freely, independently, and sovereignly. That the Fathers designed to convey the same authority is unquestionable.

There is only this difference between the two cases, which is not material as to the authority conveyed: that, whereas, in the earlier instance, the States originally possessed a plenary right and power in the premises, and expressly retained it for their own use and behoof; in the later instance, "the people" possess a plenary right and power, and expressly grant it to the States for their special use and behoof; in either case, under the Confederation or the Constitution, the States have sole possession of it.

PROOF BY SILENCE OF THE CONSTITUTION.

Again, it is a very significant fact that the Constitution erects no tribunal for the purpose of deciding contested appointments (the very use of such a combination of words as "contested appointments" is a solecism so gross as to be an argument in itself; but it is necessary, because of the confusion arising from the popular mode of electing the Electors): it is very significant, we say, that no method of settling such contests is laid down. There are three cases only in which the people and the States take part in providing the Government, viz., in the election of Senators and Representatives, and in the appointment of Electors. In the first two specific power is given to decide all contests arising, but in the last the text is intentionally and significantly silent: it can only be because such questions were matters appertaining to the powers and privileges of the States.

* Chapter i., page 15, and Chapter ii., page 26.

For Congress, therefore, to send committees into the districts where disputed elections of Electors exist, and to make an arbitrary examination into them, is an impertinent interference with the business of the State, and as rank a usurpation of power as can well be perpetrated.* To arrest the officers of the State, employed in such elections, is so gross an outrage on the liberties of the people, that it should be settled at once, by an appeal to the courts, that Congress have no such right or authority under the Constitution.†

In truth, the right of the two Houses to take any active part in the settlement of such disputed elections, even if there were a power of national revision granted by the Constitution, is altogether inadmissible, and in flagrant violation of the spirit of the System as well as of its letter.‡ To provide in one line that no Senator or Representative shall be an Elector, and in the next that Senators and Representatives may determine who shall be Electors, is so great an absurdity that it ought not to be even suggested of the Constitution, much less argued from it. But even that is less absurd than to hold that the States have a right to appoint Electors, and Congress the power to determine the appointment,—that is to say, to appoint them for the State.

PROOF BY LIMITATION OF THE CONGRESS.

But further, by Art. II. Sec. IV. of the Constitution, it is provided that "the times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof," almost precisely as "the manner" of appointing Electors is to be prescribed. Who can doubt, from this language, that a plenary power over those elections is thereby given to the State? If that assures us of it, the proviso attached makes its meaning all the more plain, viz., "but Congress may, at any time, by law, make or alter such regulations, except as to the place." It required a specific grant to endow Congress with such right in the case of their own elections, and yet they would claim it equally in the case of the appointment of Electors, where no such specific proviso or grant has been made! Furthermore, to this proviso is attached a proviso, "except as to

* Chapter iv., "The Decision Illegal."

† Chapter i., page 24.

‡ In relation to a Congressional canvass and its unconstitutionality *vide* Chapter ix.

place," negativing Congressional power in this particular. Congress cannot claim it therefore, while the States can claim it, under the original and exclusive grant, which is exactly of a kind with the grant to the States of the right and power of appointing Electors.

Two remarkable facts are pertinent just here, being experiences from our political history.

The proviso referred to was inserted on the ground that the States might refuse or neglect to arrange for the election of Congressmen, and thus the Government fall; and that it was necessary that a provision should be added, which would enable it to preserve itself. Its propriety was argued at length in the various State Conventions, pending the adoption of the Constitution, and sustained and opposed with vehemence everywhere. But the Conventions could not be reconciled to it, on the ground that the proviso trenched upon the reserved rights of the States, and would ultimately be used to subvert them. Therefore, seven of them, in ratifying the Constitution, added a protest against this extreme grant of power, and demanded an amendment setting it aside.

Why? Because in one sentence plenary power was given to the State Legislatures to regulate the manner of those elections, and, in the next, it was subjected to the uncertain *fiat* of any future Congress which might resolve to interfere in the matter. It fell under the criticism of Edmund Randolph, a member of the Federal Convention, in his letter of Oct. 10, 1787, to the Convention of Virginia, as being defective "in drawing a line between the powers of Congress and the individual States; and in defining the former, so as to leave no clashing of jurisdiction, nor dangerous disputes; and to prevent the one from being swallowed up by the other, under cover of general words and implications."

Now, there was no such protest in the case of the appointment of Electors as the State Legislatures might direct,—not a word of objection. Why? Because the plenary power was vested in the State, with no such proviso to shear it of its full significance. When Congress, therefore, claim the right to sit in judgment on these appointments, they oppose their wishes to the expectation and belief of every State in the Union at the date of the Constitution's adoption.

In answer to this general protest, Congress offered no corresponding amendment, but the power was so unpopular that it was never exerted,

and so lay in abeyance until 1840. At that date, enormous election frauds were alleged to have taken place, and particularly in Indiana, "by the importation of voters from one State, and even County, to another," and Congress undertook its radical regulation.

The upshot was, that a wide-spread excitement greeted the reception of the news, and popular protests lay on the desks of members as thickly as autumn leaves. The measure was too unpopular still, and ultimately disappeared from view. Why? Because the people felt themselves entitled to manage their internal affairs as they pleased, even if Congress were invested with superior power. And let Congress to-day enter the State of New York, as she has the down-trodden States of the South, and lay claim to a control of her electoral machinery, and the popular clamor would be as loud and as efficacious as that of twenty-five years ago.

Another significant contrast may be suggested. The foregoing proviso was framed in order to give to the Government the power of self-preservation, and, since it impaired State rights, it was vested in Congress solely on that high ground. Therefore, to have provided for an equal supervisory power in the case of the appointment of Electors, there must have been an equally cogent reason,—the preservation of the Government. The Constitution has, however, anticipated that by directing Congress to elect a President and Vice-President in case the Electors shall fail, or in case of any inability on the part of the previous incumbents.

But, again, Art. I. Sec. V. invests Congress with the power of judging election returns of their own members, although, as has just been seen, they were endowed with a superior authority of regulating the manner of appointment. It required a special provision to cover this right, even in such an exalted relationship. Upon what ground, then, can Congress claim it in the appointment of Electors, when there is a total absence of any mention of such right, either to regulate the appointment or to canvass the returns? Unquestionably upon none, but that of a wish to canvass them, which is father to the thought that the power is somewhere latent in the Constitution's ambiguous phrase: or out of it, in a *casus omissus*; or above it, in an *ex necessitate rei*.

And, finally, the 4th Clause of the electoral section delegates to Congress authority "to determine the time of choosing the Electors, and the day on which they shall vote." The remission of this au-

thority was a mere matter of policy, there being no principle involved in it ; and yet it required a special devolution of authority over even so much of the Presidential election. Note, also, that they are to have direction of only the time of "choosing," and not of "appointing," which latter is the State's full power. This careful distinction shows the large meaning attached to the word "appointed" by the Framers, and what plenary authority it conveyed ; whilst the special investiture in these instances argues pointedly to the fact that they did not intend to invest Congress in any other instance with any authority whatsoever over the electoral scheme.

PROOF BY THE SPIRIT OF THE SYSTEM.

In concluding the subject of the State's right and power in the election of a President, it may be well to revert once again to the central idea of this claim for a revision of the electoral appointments. The strongest reason adduced in support of the claim is somewhat as follows : " Shall forty millions of people bow down before the fraudulent act of a dishonest Returning Board ? " Certainly the Constitution could not have intended such servility, and the superficial logic of the question strikes into the popular head, whilst its eloquence penetrates the popular heart.

But the truth is, the argument of the orator is a very dishonest, dangerous piece of sophistry, which ought to be freely exposed.

Dissected, the question really is, Shall my party bow down to the fraud of the other party ? It is the latter which are in fact the up-holders before Congress of the dishonest Returning Board, and, were they to repudiate it, it would never be offered by the State. The scale is thus evenly balanced so far as the "bowing down" is concerned, for it is unquestionably true that the Constitution contemplates the right of one part of the people to control the other. We may even go further, and affirm that it provides, in certain cases, that a majority of the people shall be ruled by the minority. And it may be finally replied, that the Constitution takes every means in its power to keep "parties" out of a Presidential election ; and that there is no higher proof of the correctness of a Constitutional construction pertaining to one, than that it disrupts and distracts the counsels and machinations of political parties.

The spirit of the System, as set forth in Chapter II., is irrevocably

opposed to governmental, official, congressional, popular, and partisan control of this exalted duty,—the election of a National Executive; and we have just seen demonstrated that the letter of the law, examined in various ways, provides categorically for the same official and partisan non-interference. The spirit and the letter are in harmony, and mutually confirm each other.

THE CERTIFICATE OF APPOINTMENT.

At this point we may legitimately examine the following query: How shall the State's Electors be duly authenticated to the nation, as her *bona fide* appointees?

Manifestly by the certificate of the Executive of the State, covered with her great seal, as all such documents are required to be. The Governor of a State is her head, and in all ordinary cases represents the State as her official exponent, to whom other States, as well as the nation, look for information concerning her wishes and doings. All legislative acts and commissions become operative by his signature, authenticated by the seal of the State, and why not this?

The act of 1792 takes this view of it,* and the act of 1845 employs the Constitutional word "choosing" in fixing the day for the election or choice of Electors; thus indicating that the finishing act of appointment is at some other time, and of necessity it cannot be complete until after the canvass of the popular vote.† An election of Electors is different from other popular elections, and, being prescribed by the Legislature as one of the steps in the process, it is merely an expression of the popular wish for a certain person's appointment; if he be eligible and alive at the stated time, the Governor appoints him. The people cannot "appoint"—they can only choose; the Legislature are limited to a regulation of the "manner," and there remains only the State's Executive to exercise the power.

Furthermore, the Constitution carefully distinguishes the three terms, "choosing," "electing," and "appointing," requiring their interpretation as technical terms, neither of which is synonymous with the others; and this is particularly confirmed by the concurrent resolution passed by the Federal Convention.‡

* Chapter xii., "The Act of 1792," sec. 3. † Chapter xii., "The Act of 1845."
‡ Appendix, "The Resolution of 1787."

But we are not remitted, in determining this question, to custom or inference alone; the provision itself contains within it phraseology which is conclusive evidence of the lawful appointing agent.

The State government, like that of the nation, is divided into two political branches, legislative and executive, and the "State" can only be known by means of her Government. Appointment is an executive function, to be executed solely by an executive officer, though possibly under the regulation, or with the advice and consent, of the Legislature. Thus the Constitution provides for the appointment of national officials by the President, "by and with the advice and consent of the Senate," however. In like manner it has provided for the appointment of Electors, the Legislature being authorized to prescribe the manner and the Governor to perform the act. For, since the State can only act by her Government, and since that is divided into two branches, the fact that the Constitution has categorically limited the Legislature to the prescription of the "manner," is a demonstration of the fact that it requires the Governor to "appoint." The Legislature cannot appoint, by reason of the limitation, and the Governor must.

If the question be put, Why does the text not designate the Governor? the solution is easy. To provide "The Governor of each State shall appoint," would be to invest him with plenary authority over the selection of Electors,—a non-republican power,—and that must not be. It was proposed in the Convention, and wisely rejected. Instead, they substituted the word "State," meaning thereby,—the Governor shall appoint Electors, but the appointment must represent the will of the State, and the Legislature may regulate it in the interest of the State. The Journal of the Convention exhibits very clearly the various steps by which this provision came into being,* and how the Fathers amalgamated all previous propositions in this, defined the power, guarded it from supervision, indicated its executive, limited the manner, assigned it to local interests, made it a purely republican function, and distinguished the constituent members of the Union,—and all by the short and comprehensive phrase, Each State shall appoint as its Legislature directs. As a specimen of the workmanship of the Framers of the Constitution, that simple provision is a masterpiece.

* Chapter xi., "An Electoral System Proposed," "Opposed," and "Presented."

Observe now the exact analogy which exists between the ordinary mode of appointing an Elector by popular vote, and that of an officer of the United States by the President, which has just been referred to. In both cases there are a nomination, a public discussion, an election, a canvass of the votes, a return of the result to the President or Governor, and an issue of a commission by him ; the appointment is then complete. No one, it is presumed, will maintain that it is the privilege of persons, to whom that United States commission is presented, to doubt it, or hesitate to accept it, or delay a recognition for the purpose of discussing it. The very idea is absurd : it authenticates itself by the seal of the United States, and is evidence to the world that its bearer is duly commissioned to act for the nation as is therein set forth.

Why then is it held lawful to "go behind" the sealed certificate of the Governor of a State, that so-and-so is an Elector ? Manifestly the underlying principle is the same. The certificate evidences the representation of the State in this specific trust, and is a notice to the United States to that effect, which can no more be rightfully ignored than can that of the Nation in its own sphere. To disregard either, is the prerogative only of a higher authority, or a violation of the rights and privileges attaching to it.

Were a warden of a jail, however, to have thrust in his face such a commission from the United States as a reason for letting its bearer, his duly-accredited prisoner, pass, it would not be a good authority : a law of higher degree has now overridden it, and the public safety demands that the officer shall not pass. The President's certificate of official character must be ignored by another official, of supreme power here, sworn to execute the laws of the State.

Thus we shall discover, in the succeeding part of this chapter,* that a State certificate of appointment, opened by the President of the Senate and found to cover the name of a Senator, Representative, or officer of the United States, is nullified by the higher law of the Constitution, that no such person can be an Elector, nor cast a lawful electoral vote ; the higher law must take precedence, and the sworn officer of the government must see that such a vote does not pass. Except in such cases, the Governor's certificate is *prima facie* evidence of the bearer's appointment.

* Page 69.

It is admitted that frauds may prevail in appointments, but they concern only the States wherein they arise. The State Legislatures may decree, or the State courts inflict, a severe punishment for such wrongs, as they should, so that no Returning Board, or other official, will dare the vengeance of the State whose trust it is invited to outrage, and we should probably hear of no more frauds of the kind.

If it be objected still that a punishment of these rogues will not purge the national election of dishonesty, that is granted. And it is further asserted that the Constitution never intended, absolutely prohibits in fact, the incumbency of a fraudulently-elected President; and that further, there is specific Constitutional guarantee, which has already been referred to, that a State shall have a fair and not a fraudulent representation in the election. Where the "manner" of an appointment begins with a popular election, by direction of the State Legislature, the people may demand a return of the persons lawfully elected to the Governor, and their appointment by him as Electors; and the State has a right to such a representation made in pursuance of her own laws. When, therefore, a State has been defrauded of this right by official or other dishonesty, it is her privilege to be heard in proof of it, for it is not the "appointment" which the Constitution has provided.

DUAL AND FRAUDULENT RETURNS.

At this point naturally presents itself the subject of dual and fraudulent returns.*

They come from two factions in the State, they are based on the State elections, transpiring under State laws, and they do not concern the nation, but the State whence they issue. The Constitution provides that the State shall have a given number of Electors, and the United States must see that she have that number. It has further declared the right of the State to "appoint" these Electors, and there it stops; it has provided no rule prescribing what shall be deemed her true appointment. She must decide this question, and then apply to the United States to execute her lawful desires.†

In the mean time, however, national interests demand that the President be declared. The State Government represents one side of the

* Chapter vi., "Dual Returns."

† *Vide* the method proposed in Chapter xiv., "A New Law."

dispute and the majority of the people the other; the question can only be definitely settled by the State courts, and they have as yet been unable to decide it. Therefore, at the opening of the votes, the United States, in support of the immediate and greater interests of the nation, accepts the vote of the faction represented by the *de facto* Government of the State.* Coming from such a source the votes are *de facto* good.

The question of the *de jure* votes must lie in abeyance until the State decides it; but clearly such votes alone the Constitution must have had in view. The basal fact upon which stands a President, representative of the people of this Republic, is the honesty of the State representation; the Electors may vote as they please, but they must be her *bona fide* appointees. When, then, the State has decided the contested election, she may lay that decision before the United States, and ask recognition of the votes of her true representatives; and it is the duty of the Government to grant the request. Otherwise, a President may be permanently seated by a fraud upon the rights of the States, against which is interposed a higher law than that of expediency involved in the prompt, if temporary, declaration of the President, viz., justice to the rights of the State.

It may not be argued in opposition that the Electors must vote on a given day, and that after that day they are *functus officio*. That is true, but there is now operative the broader principle of State Representation. A specific day for the casting of electoral votes is required in order to prevent certain intriguing combinations, which will issue in a fraud upon the nation, as will fully appear hereafter.† In this case, however, the State, firstly, is not seeking to perpetrate a fraud; and, secondly, has not lost the right to representation by a *laches*; she is innocent of wrong or of neglect, and therefore relies on the right still unused. Furthermore, to plead this provision as a bar is to adduce a rule, instituted to prevent the incumbency of a fraudulently-elected President, in support of an incumbent who has been fraudulently elected. The objection is impotent in a just and harmonious execution of the Constitutional provisions.

There is then established by this brief examination, a method of

* Chapter v., "Purity and Independence," 6.

† Chapter v., *Ibid.*, 5.

executing the Constitution which is reasonable, just, and universal in its application, as a correct method should be, viz.: The Constitution must be executed primarily in the interests of the Nation; that is, the immediate national good must prevail over remote State interests, but not to the ultimate exclusion of the latter; whilst the maintenance of the Constitutional rights of the States is finally the truest and highest good of the Nation.*

The State, then, having a higher and stronger right of hearing than have these Electors, who are illegal as respects her, the Nation is in duty bound to give her a suitable tribunal, whereat her reversal of their invalid appointment may be duly arbitrated on, and its legitimate effect on the election be duly declared.

If Congress refuse a special court of arbitrament in such cases, then the Supreme Judges of the Nation may be appealed to. The Spirit of the Constitution is to be executed, rather than the letter, always; and in no exercise of duty by the Government is it possible always to obey the spirit and execute the exact letter. For this reason are courts ordained, that they may declare the truest interpretation of the law, and the Supreme Court concerns itself specially with cases arising under the organic law.

In the foregoing instance we have a case where a State, entitled to a certain representation with other States, by her chosen delegates, is dispossessed of that right, firstly, by the fraud of her appointing agents, and, secondly, by the fact that the Constitution has directed no officer of the Government to determine these judicial and local matters; so that her *prima facie* good, but actually false, votes have been accepted. She enters the National Courts and asks for judgment against the United States, that these votes, counted once under a policy of the organic law, may be rejected now on the higher ground of constitutional right; and that her rightful votes may have their rightful weight in the election. Policy may demand a prompt declaration of the result of the votes, but justice demands that afterwards the true President be ascertained.†

It will be shown, however, at a subsequent part of this analysis,

* Chapter iii., page 71, and Chapter iv., page 74.

† Chapter xiv., "A New Law," sec. 6, provides a simple and efficacious method of procedure.

that by an anticipatory of action of the government, by the enactment of a suitable law as the Constitution demands, no disputed elections will probably hereafter arise, requiring judicial interposition.*

Just here the question arises, What is the effect of this interpretation on the election of 1876? It is an important one, a radical one, and there is no propriety in avoiding it. Political parties may agree to ignore it, the press may declare it a dead issue, Congress may repose on their recent electoral law, and the people affect an indifference; but these are not valid reasons wherefore this treatise should refuse to look the issue squarely in the face.

It is claimed and it is proven, that the State of Louisiana was defrauded of her lawful representation by a dishonest Canvassing Board and the authentication by the Governor of the persons returned by it. The matter was laid before Congress, and Congress decided it in favor of the fraudulent Electors. The votes of those fraudulent Electors seated the Republican candidate in the chair of the President of this Nation.—It has been shown, it has been demonstrated, that Congress have authority over not one jot or tittle of an Elector's appointment; being devoid of such authority they cannot obtain it by an electoral law, or an Electoral Commission, which their own act has constructed. Their decision, therefore, was invalid, worthless, impertinent, and the votes which they declared to be lawful were as illegal as the law under which they were acting.† Illegality is not of to-day, or yesterday, or to-morrow, it is for all time; and the candidate elected by those illegal votes was unlawfully, dishonestly placed in the most honorable seat in this Nation; he was then, he is now, and he will be so long as the world possesses a history of the United States.—Louisiana was entitled to an actual, and not a fraudulent, representation in the election; she did not forfeit the right, she has not lost it, and she possesses it still. The issue rests with herself. If she desires it, she may demand it, in the manner heretofore indicated, at any time during the existing Presidential term.

The foregoing remarks apply also to the State of Florida.

* Chapter vi., "Dual Returns."

† Chapter xii., "The Act of 1877."

THE LIMITATION AS TO "MANNER."

There are two limitations attached to this grant, which, however, only affect the exercise of it.

The former is, that this appointment shall be under the direction of the Legislature of the State; and the latter, that it shall not extend to any Senator, Representative, or officer of the United States.

The former was undoubtedly provided, as Judge Story has suggested,* in order that thus the people of the State might have a representation, if they pleased to require it; and it corresponds with a proposition laid before the Federal Convention by Hamilton,† that the Presidential election should be made by "Electors, chosen by electors chosen by the people." In early days the State Legislatures elected Electors, and that was probably what the Convention expected, or perhaps preferred, would be the custom. Thereby the people would be kept entirely free from the excitements of a Presidential contest, which was most desirable.

But in delegating a power to a State, since the people were the prime originators of her acts, it was deemed wise to leave the regulation of it to their immediate representatives, the Legislature, who might be more capable of judging subsequently of the most fitting mode of executing it. This accords with the practical wisdom of the Framers, who, since no principle, but only a policy, was involved in the "manner" of an appointment, refused to limit it only so far as required by the principle of a non-popular Presidential election, and the principle of a republican method.

There is undoubtedly conveyed in this grant to the Legislature the full power of selecting the "manner" that may seem to them most desirable. The grant is not extravagant, since the Legislatures are, constructively, the people of the States; and any plan which they choose is the plan which the people choose, so long as it stands unrepealed on the Statute Books. Therefore any commission, board or officer, who may be charged by the Legislature with the selection or choice of the Electors, exercises, by direction of the organic law, the State's full power *quoad hoc*. The conclusion or final determination of the appointment is a right belonging to the State, for the board or officer

* Chapter ii., page 33.

† Appendix, "Journal of the Convention," June 18.

can go no further, under legislative permit, than the "manner," that is to say the selection, the formal act of choice, and the State exercises her prerogative by accepting it, tacitly or otherwise.

The power to regulate the manner of appointment includes a control over the method determining the persons selected. This is a necessary implication from the possession of the power of regulation; otherwise a Legislature, directing that one part of the appointment shall be made by popular election, for example, would be debarred from passing a law providing for a canvass and return of such election, or for the settlement of any dispute concerning it, which would nullify their power of regulation altogether and reduce the grant to an absurdity.

The power to determine the persons selected involves the power of defining what shall be an election and canvass, and the power of investing some board, or other official body, with final authority to determine elections; since it would be inconvenient for the Legislature to investigate all preliminary matters in order that justice might be done. That power is ample, and the Returning Board, as in the recent cases of Louisiana, Oregon and Florida, may be clothed with the full power possessed primarily by the Legislature.

But the power granted to the Legislature does in no wise include either the right or the power to "appoint" an Elector; that, as has been shown, has been invested alone in the "State." It is indeed the right of the Legislature, under this grant, to provide regulations governing the final act of appointment, so that the various steps in the process may be exactly defined. In no instance have they been wise enough to enact such a definitive law, and their labor has been confined to providing a popular election, a canvass of the votes, and a return of the result to the State authorities.

It is manifest that there may thus be three issues to the appointment at this stage. First, the Governor may issue a certificate to the persons elected; second, he may issue it to persons returned by the canvassing agents, who are not elected; and third, he may ignore the returns and certify to persons selected by himself. In the election of 1876, the first method was pursued by nearly all the States, the second obtained in Louisiana, and the third was followed in Oregon.

In the first instance the law of the State is executed, and she is represented fully and rightfully, as the Constitution designed. In the second the Governor is warranted in commissioning the persons re-

turned under the statute, but the Board has defrauded the people: the transaction occurs exclusively under State law, and must therefore be examined and determined by the courts of the State, whose judgment should be of superior virtue, both with the Governor and with the nation. In the third case the Governor has dishonestly or ignorantly violated the laws of the State, and again the State Courts should interpose to determine the lawful appointment. A lawful appointment is what the Constitution provides, and, the State courts having judicially decided it, if the Governor refuses to recognize them, Congress is in duty bound to devise a plan by which this lawful appointment, and the votes of the lawful Electors, may take precedence of the unlawful certificates furnished by the Governor and the illegal votes attached to them.*

But this revision by the courts or the Governor must be taken prior to the execution of the act for which such Electors are appointed, in order that the agent of the United States can take cognizance of it at the Opening of the Votes; for before such reversal it is to all intents and purposes a legal act, by reason of the State's plenary power over it, and the Electors so appointed are, as respects the nation, the State's Electors *de jure* and *de facto*. Such Electors, bearing such credentials, the United States are constitutionally bound to recognize, provided they are not national officers.

THE LEGISLATURES UNTRAMMELLED.

The question has more than once arisen as to the necessity of a regulation of the manner of appointment by the State Legislatures, and whether or not the State's appointment is vitiated by the absence of such regulation.

From the whole tenor of the preceding examination, it is clear that there can be no national supervision over it; that it is a provision framed for the benefit of the people, if it pleases them to exercise it; and that, therefore, not being prescribed for the national good, a failure to exercise it does not vitiate the appointment as respects the United States.

But there is further evidence of this. The Constitution provides only that the Legislature *may* prescribe the manner of appointment, and not that it *shall* do so; and there is no question of the fact that this language was specially selected to express a gift, to be enjoyed

* A simple plan is proposed in Chapter xiv., "A New Law," sec. 6.

with all the freedom imported by that word, and not to lay upon the Legislature a command.* This is clearly shown by a comparison of the expression here employed with that of other provisions in the instrument, when it becomes apparent that this form of grant, devolved by the word "may," is universally designed to exclude all oversight by others of its exercise by the grantee; and, on the other hand, when "shall" is used, that it imports a peremptory order, which must be enforced in all cases where authority is given to control it. The Committee of the Federal Convention "on the style" of the Constitution spent four days in revising carefully just such important words as these, and with the result of bringing this feature of the instrument to a state of perfection.

Art. I., Sec. VII. 3, "Every resolution, etc., to which the concurrence of the Houses *may* be necessary, *shall* be presented to the President for signature"; Sec. V. 3, "Each House *shall* keep a Journal, and publish the same, except such parts as *may* in their judgment require secrecy"; 2, "A majority of each House *shall* constitute a quorum, but a smaller number *may* be authorized to compel attendance"; Sec. III. 2, "If vacancies (of U. S. Senators) happen during the recess of the Legislature of a State, the Executive thereof *may* make temporary appointments until the next meeting of the Legislature, which *shall* fill such vacancies"; Art. II., Sec. I. 4, "Congress *may* determine the time of choosing the Electors, which day *shall* be the same throughout the United States"; 6, "Congress *may* provide for the case of removal, etc., of the President, declaring what officer *shall* then act as President"; Sec. III., "The President *shall* give Congress information of the state of the Union; he *shall* receive ambassadors; he *shall* take care that the laws are faithfully executed; he *shall* commission all officers of the United States; he *may* convene both Houses, or either of them, on extraordinary occasions, and if they disagree, he *may* adjourn them to such time as he thinks proper."

These examples set forth clearly the intent of the Constitution as to the devolution of a privilege or command by the use of "may" or

* The ancient and well-known common law rule, that "may" in a statute is to be construed as "shall," where the public interests and rights are concerned, does not apply in this case. Firstly, the people of a State obtain no rights under this Constitutional provision; and, secondly, the Constitution has itself determined the construction by carefully discriminating the two words.

"shall"; and that where "shall" is used, the execution of it is peremptory and may be enforced, but where "may" is used, its exercise is at the discretion of the grantee, and cannot be supervised. This intent is emphasized further by the fact that, in copying this provision from Article IV. of the "Articles of Confederation," the Convention substituted "may" in the stead of the original "shall."*

Applying these examples to the case in hand, it is obvious that, when the Constitution provides, "Each State *shall* appoint Electors," such appointment is subject to the canvass of the national agent as to its emanation from a "State"; when it says that "No Senator, Representative, or person holding an office of profit or trust under the United States, *shall be* an Elector," the act or vote of such ineligible person as Elector is subject to revision by the national agent; but that, when it says "the Legislature thereof *may* direct" the manner of the appointment, such regulation is absolutely under the control of the grantee, and is subject to no other authority or oversight.

This question was a prominent one at the Presidential election of 1797, which Jefferson lost by only three votes. It transpired that Vermont had appointed Electors by the vote of her Legislature, but that no legislative regulation of "manner" had ever been made.† Instantly the partisans of Jefferson declared that the appointment was vitiated, and the Electoral votes therefore invalid; could they have caused the votes of Vermont to be rejected, Jefferson would have been the President by one majority; therefore they heaped petitions on the tables of the two Houses, and strained every nerve to move Congressional opinion in their favor. But they failed. No one of intelligence and character doubted the validity of the appointment, and when old John Adams opened and counted the votes of Vermont, electing himself and defeating Jefferson, he did it with the approval of every one of the witnesses before him.

In the recent examination by the "Electoral Commission" of the South Carolina dual certificates, it was objected to both that they violated the constitution of the State, which had enjoined a registration of the voters in all popular elections, and that such a registration was not made in the election of Presidential Electors.‡

* *Vide page 48.*

† Chapter xii., "The Bill of 1790," Jan'y 14, and Chapter xiii., "1797."

‡ Appendix, "Annals of Congress," 1877.

The objection was invalid, under both the letter and the spirit of the Constitution; for the popular choice was made in compliance with an act of the State Legislature, and ratified by the subsequent conclusive appointment as the general statutes had directed. If the Legislature thereby violated the State's constitution, it was a blunder or a fraud for which they are responsible to their local superiors, but not one of which the nation may claim a corrective oversight. Therefore the appointment of her Electors was legal as respects the United States, and the "Commission" so decided lawfully, even though by an unrighteous partisan vote of eight Republicans to seven Democrats.

The question really underlying this South Carolina case is, Was there an election at all? Granting that there was not, the *status* of the electoral certificate is nevertheless unaffected. The Constitution has provided only for an "appointment," and the State's *de facto* Electors, armed with the State certificate declaring such appointment, are the nation's *de jure* Electors, whose votes must be received.

THE EXCEPTION PROVES THE RULE.

It is worthy of note that even this qualifying and limiting direction unconsciously strengthens our interpretation of the plenary power of the State.

Firstly, it cannot fail to strike the student of this limitation, that our conclusions are exactly correspondent with the spirit of the Electoral System, in the prosecution of its desire to devolve the whole responsibility of her representation on the State alone.

In the second place, its operation is confined entirely within the State. It thus excludes national interference, or that of other States, with the "manner" of an appointment, by rejecting their assistance at the outset. There is but one reason possible, why the Constitution did not direct that the appointment should be made in such manner as Congress, or the National Republican or Democratic Party, or any other power or organization, should direct; and that is, that it desired the State to control this matter wholly and exclusively.

Thirdly, this power of regulation fixes finally the source whence are derived the popular elections of Electors. As before noticed, it was customary at first for the Legislatures to choose the Electors, but in process of time the custom has changed, and now almost universally the people elect their quota.

There is here involved one of the simplest and yet strongest possible proofs that the popular will is not to have national consideration in a Presidential election, and why it is overlooked by partisan declaimers in Congress is a mystery.*

The right of the people of a State to be represented in an election is not a natural and original right; that belonged at one time to the nation at large, but "the people" of the United States, in the Constitution, surrendered it to the States, together with the power of appointment. The States cannot divest themselves of that right and power, nor delegate them to the people or to anybody; nor have they ever done so. But the Legislatures of the States are empowered to direct the "manner" of an appointment, and that they have decided shall be by the ordinary forms of a popular election and canvass. The people then obtain no national rights by force of such an election law, nor can they claim for their Legislatures an authority over the act of appointment; they are simply a part of the State machinery of appointment, and of less value, as respects the General Government, than the Returning Board which is empowered to canvass and determine the result.

The probability is that the custom of a popular election which prevails, in which the respective Presidential candidates are well known and mediately voted for, has confused the not overly clear heads of some of the country's statesmen, and they have forgotten that such a custom is not only not contemplated by the Constitution, but that it is in flagrant violation of its spirit.†

There is another fact worthy of note just here. The election of Electors is different from all other popular elections in the United States; its forms may be similar, but its essence is completely changed. In elections generally the people exercise a sovereign right of choice, because they are the Sovereigns of the States of which they are citizens, and no authority in the State or the nation can divest them of it. But in this election they are absolutely under the direction of their Legislatures, at whose discretion they exercise the privilege accorded them. Therefore when the Legislature of Louisiana directed its Returning Board, in 1876, to throw out the votes of parishes where there was proven intimidation, it was not overstepping its own prerog-

* *Vide page 41.*

† Chapter ii., page 28.

atives, and the citizens, whose votes were rejected according to the spirit of that statute, were not thereby disfranchised.

LIMITATION AS TO U. S. OFFICERS.

The second limitation makes Senators, Representatives, and all officers of the United States ineligible to the office of Elector.

Why this clause was inserted is obvious. The reasons, which prevailed with the Convention and induced the change from an election by Congress to one by Electors, as they are succinctly stated by Gouverneur Morris,* have prevailed here also. The Electors were to elect the President, and the Fathers distrusted Congressional influence; and as to officers of the United States, they had received appointment at the hands of the President and Congress, or either of them, and were part of the machinery of the government, which, it was desirable, should have no part or lot in the election.

This provision could have been foreseen from a consideration of the scope of the electoral scheme, as its authors have explained it, and it is also strongly confirmatory of our position respecting the preceding limitation. The two are, in fact, positive and negative statements of the same principle,—the sovereign right of representation by the States in an election. By the former, all oversight and control of the selection of Electors was kept strictly within the bounds of the State; by the latter, all control of the actions, or votes, of the Electors was strictly prohibited to the Nation. A true representation by a State under the electoral scheme comprehends two things; first, the right to select and appoint her own representatives, and, second, exemption from outside influence on them, so far as can possibly be guaranteed,—that is, by the letter of the law. A fair appointment and a fair vote of the appointees, constitute the sum and substance of the right with which the State is invested.

It is a beautiful illustration of the virtue of our Constitution, the perfection of these details; and one's admiration increases as he observes how the Fathers laid down certain principles, and slowly and patiently brought their work into perfect conformity with them. They see everything, do everything, and forget nothing.

* Chapter ii., page 31.

THE UNITED STATES THE GUARANTOR.

As to the effect of this limitation, it herein differs from the former that, whereas the guarantor of the former can only be the State, the guarantor of the latter can only be the United States.* It is impossible for the Nation to know officially that the "manner" of appointment has been directed by the Legislature, and just as obviously is it impossible that the State can know officially whether or not a certain person be an "officer of the United States," while it is clear that the United States can precisely know the latter, through the mediums responsible for the appointment. It is just as clear however that the prohibition is of binding force upon the State, and so far limits its appointment absolutely, and that it extends to a positive ineligibility to the office of Elector by the parties named.

As the former limitation is a command which the State should fulfil, so likewise is this; and both are enjoined upon her with all the authority of "the supreme law of the land," though one is made for the chief good of the State, and the other for the interests of the Nation. In such wise are the two tables of the Decalogue obligatory, as Heaven's supreme command, though one is instituted for its Author's glory, and the other for His people's happiness. In the end the highest good of all the parties is accomplished.

The observance of the former prohibition must however depend on the good faith of the State; that is expected on the part of all the members and officials of this Republic; and the people of the States should see to it, that their Legislatures establish such regulative ordinances as will conserve their interests, and not the selfish designs of political cliques.

The observance of the second prohibition can be enforced by a requirement of Executive certification, as in the case of the Electors' names, which will bring the matter immediately under their official notice, and enable them to correct any irregular appointments before the casting of the votes.† A prime object of the electoral scheme is to enable the State to cast her full quota of votes, and such a law

* *Vide* the discussion of this point at page 61.

† Chapter xiv., "A New Law," sec. ii. 4, and sec. v. 2, 3.

would assist in making the Constitution herein operative, and aid the State to the attainment of her largest rights.

If, with the organic law and the federal statute before her, she fails to obey the injunction, then unquestionably she loses her vote, on the legal ground that no one can take advantage of his own neglect. If this be a loss to the State, it is also a gain to the larger interests of the Nation; for the principle thereby violated is the fundamental one of the Electoral System, the command is expressed with all the force and effect of the emphatic "shall," and the Constitutional provision directing it must be rigidly enforced. But the loss extends only to the ineligible Elector or Electors, and the rest of the votes of the State must be duly counted.*

In 1837 there was brought to the attention of Congress the fact that six of the Electors appointed by the States, and who had cast their votes, were officers of the United States.† The Senate, as was their habit at this period, decided nothing as to the propriety of rejecting them, and the House concurred in the action. The language of the report indicates their doubt of Congressional jurisdiction. The result was that the votes of these ineligible persons were unlawfully counted.

The question raised at the last election, whether the ineligibility of a candidate who has a majority of the popular vote, extends to the avoidance of the votes cast for him and the consequent choice of his competitor; or, whether it only creates a vacancy in the State's representation, which, under the Constitution and the law of 1845, she might fill prior to the casting of the vote by the college,—is of no moment in this analysis, neither does it in anywise concern the Government or its agent.‡ Under the plain terms of the Constitution, the State has a right to a count of all the votes sent agreeably to the national law. If, at the casting of the vote by the Electors, the full quota of members to which she is entitled please to vote, and if these have been duly certified as appointed, and are not Senators or Representatives, or officers of the United States, then their votes must be counted.

* The general question of "ineligibility," as it hinges on the decisions of the "Electoral Commission," has been discussed elaborately in the succeeding chapter.

† Chapter xiii., "1837," and Appendix, "Annals of Congress."

‡ Chapter iv., "Anticipating the Issue in Oregon."

It must be observed finally, that the case of the appointment of national officers is the only one in which the United States may nullify an illegal appointment; and the reason is that this is the only case in which the Constitution has prohibited the appointment.

All other cases, as we have seen, arise from fraud within the States and under State laws; they therefore only impinge on the interests of the State, are subject to her own judgment and correction, and are relegated to her for adjustment, whenever they have the mischance to be urged at the Opening of the Votes. Such an appointment, however illegal and incomplete as respects the State, is absolutely legal and conclusive as respects the United States; whilst the appointment of an ineligible person, however desirable as respects the State, is absolutely illegal and impotent as respects the United States.

CHAPTER IV.

INELIGIBILITY.

"I hold the maxim no less applicable to public than to private affairs, that honesty is always the best policy. I repeat, therefore, let these engagements be observed in their genuine sense."—GEORGE WASHINGTON.

THE FLORIDA CASE.

AT the last election, the ineligibility of officers of the United States assumed very great prominence in the proceedings of Congress and of the "Electoral Commission," and, in fact, took part in seating a national President. It seems advisable, therefore, to examine the question in detail, from the stand-point of the "Commission," in the endeavor to develop the true spirit of the provision and its legitimate effect on the electoral votes.*

It is not in point here to discuss the constitutionality of the "Commission," which will be dealt with hereafter; † nor to dissect all their rulings, though under a keen scalpel little but skeletons would be left of them; nor to furnish the key to their decisions, which may be unlocked without an excess of skill. Such an analysis, though enticing, would be a diversion into territory forbidden by the scope of this volume, and must therefore be relinquished in favor of an examination only so far as the question of ineligibility is involved.

The "Commission," whether constitutionally competent or not, were certainly a body of exalted and eminent men, whose decisions, whether legal or not, may have weight as expositions of the Constitution, and, if erroneous, must exert a correspondingly baneful influence. It is therefore advisable that they be examined here in detail, and, tried by

* The general principles of Ineligibility are discussed in Chapter iii., page 68, *et seq.*, and that ground will be avoided herein as far as possible.

† Chapter xii., "The Act of 1877."

the tests of logic and law, of common sense and the Constitution, they must stand or fall as they are in accord or disagree with them.

At the Opening of the Votes in 1877 objection was made to the vote of an alleged Elector from Florida, on the ground that he had been an officer of the United States at the time of the State election at which he was chosen.

Under the rules the question came before the "Commission" for decision. The person himself was examined, and he testified that he had sent in his resignation prior to said election. The other side had no evidence to offer to the contrary, and the "Commission" reported as follows: *

"The Commission is of the opinion that, without reference to the question of the effect of the vote of an ineligible Elector, the evidence does not show that he held the office of Shipping Commissioner on the day when the Electors were appointed."

It may be observed that the word "appointed" here means "elected by the people," as is shown by the testimony and examination before the "Commission," and also by another part of the decision.

Further, judgment is withheld as to whether the vote of an "ineligible elector" is invalid, in contravention of the principle that an ineligible person is disqualified for office, that therefore he cannot legally hold office, and that on this account his vote is void.

PRIMA FACIE, ILLEGAL, AND INVALID VOTES.

In so far, however, as the above ruling maintains the general principle that an electoral vote is *prima facie* valid, it is good; but it is obvious that such a general principle is always subject to specific statute, and, in the very nature of the case, is not paramount when there is an express provision to the contrary.

In the case of the electoral votes, at their Opening before the Houses, under this latter principle the sealed list purporting to contain the electoral certificates must be unsealed; but if it be then found to contain some burlesque or other indecent inclosure, it may be opened no further; the express provision, requiring the certificate to emanate from a *bona fide* Electoral College, interposes to reject it. In like manner if a vote is returned as cast for "Queen Victoria," its

* Appendix, "Annals of Congress," 1877.

acceptance would be farcical; it may be a *prima facie* vote, but so clear a constitutional provision exists as to whom the Electors may vote for, that it nullifies the effect of the general principle as to this particular vote.

We have herein involved another principle, so broad and strong and omnipotent, and so clearly incumbent by the express provisions of the Constitution, that it must become operative as soon as the circumstances arise, viz.: Where the Constitution has specifically declared a vote to be illegal, it must be rejected as invalid. The above instances set forth the principle, and it must always operate. It is not a policy, to be employed in those two cases and neglected in others; for policy cannot enter into the reception or rejection of the votes,—it can only be the organic law.

It must be observed, however, that this principle can operate only within fixed limits, and those assigned to it are the National interests. The reason of this is obvious. The Constitution is a definition of the powers, privileges, and duties of the United States in the first instance, and only collaterally of the States and the people, and the latter are therefore subservient. But in certain cases it has guaranteed certain rights to the States and the people, and such rights the United States are bound to protect; they however must of necessity be of secondary consideration to those of the Nation.

A simple and patent example is at hand. The Constitution confers upon the States the large right of representation in a Presidential election, and on the Nation an immunity from the intrusion of any foreign potentate as their President, by confining his election to natural-born citizens. The second is the higher consideration, because it concerns the good of thirty-eight States; the first is subservient, because it is limited to the interests of one. If therefore electoral votes are cast for "Queen Victoria," they are in no sense votes under the Constitution; the action of the college has subverted the extent of the privilege accorded the State; the national interests must not be jeopardized by the foolish or wicked act of the State or her representatives; nor must the organic law, prescribing the national good, be disrupted in supporting the secondary right of a representation, which the State has thus forfeited. On their face the votes may be good as coming from a constitutionally constituted Electoral College; but in fact the votes are void, as being the unconstitutional choice of said college.

To reject such votes requires no judicial expert, examination, or discussion; the standard of the Constitution is clear and specific, and that line and plummet set against the votes condemns them; it is not the President of the Senate, or the Congress, that rejects them, but the fundamental law of the land. The execution of the Constitution is therefore a canvass, but is not a judicial judgment.

SOME CASES IN POINT.

Two cases in point arose at the recent Opening of Electoral Votes, which involved this principle, and they will illustrate the applicability of the rule to all cases wherein there is an illegal vote; they will also show how much superior the native common sense of Congress sometimes is to their legal acumen, or the political principles which guide them.

At the Opening of the Louisiana votes a certificate was laid before Congress, which, on reading, proved to be an indecent and ridiculous travesty, and which never should have passed out of the hands of the President of the Senate.* It was at once met with a general disapproval, and subsequently thrust out of sight and consideration. Why? Because there was a universal perception that it was illegal, and therefore invalid, as soon as its contents were disclosed, though externally it had borne the appearance of a good certificate. This was Congressional common sense, and the Houses quietly and efficiently executed the Constitution concerning it, according to the standard therein laid down, and without any quibbling demands for sufficient proof.

At the Opening of the Nevada certificate one vote was objected to on the ground that it was cast by an officer of the United States, and was therefore illegal and invalid. The House decided against counting it, but the Senate fell back on the want of proof, as suggested by the "Electoral Commission," and, under the rules, the vote was counted.* This is an example of Congressional principle, when party interests and the Constitution conflict; and it proves that the latter is not always "the supreme law," as it was intended to be.

But there is more than simple law-breaking herein illustrated. Recall how sedulously the Fathers labored to keep fraud out of the Presidential election, and how carefully, therefore, they excluded con-

* Appendix, "Annals of Congress," 1877.

gressional interference; and now behold Congress openly arbitrating upon the votes, not gauging them by the plain rule of the Constitution, as officers of the Government should, but hair-splitting, disingenuously concerning "*aliunde* evidence," for the purpose of counting an illegal vote and electing a partisan President.

The lessons of this election are so clear and so forcible, that they emphasize anew the wisdom of the Fathers in framing the Electoral System, and their inflexible sagacity in excluding Congress from all participation in its execution.

U. S. OFFICERS CANNOT REPRESENT A STATE.

There is no clearer principle set forth in the Constitution than that the Presidential election must be free from intrigue and corruption, that is, that it must be fair and honest; the burden of these foregoing dissertations has been to that effect. And there is no clearer policy established by our investigation thus far than that of the absolute prohibition of all interference in an election by the members and officers of the Government. The foundations of the policy lie deep in human nature, and it is against the manifest interests of the nation, *i.e.*, of the people, that the Government should take part in the election of itself,—its election is peculiarly the prerogative of the people and of the States, if it is to be representative in any pure sense.

We shall see in the discussion of the Electoral Colleges, Chapter V., how carefully and exactly the Fathers hedged in the purity and independence of their votes.

In maintenance of this principle of an honest Presidential election, and in execution of this policy of the exclusion of governmental interference, the Constitution has enacted a clear and specific law, that "No Senator or Representative, or person holding an office of profit or trust under the United States, shall be appointed an Elector." The language is not simply affirmative of the principle involved, but it is in the strongest negative possible, terse and comprehensive, and it is attached to the preceding grant as a prohibition, without qualification. The exact significance of the context is, Each State shall appoint her own Electors, and may appoint whomsoever she pleases, except an officer of the United States.

RIGHT TO REPRESENTATION FORFEITED.

Now, the right to appoint Electors is the high right of representation in the election, and this proviso is attached to it as an exception. If therefore the State violates the proviso, she forfeits the right, under any just and rational construction.

We are told that the Lord placed Adam in the Garden of Eden, permitting him to eat of the fruit of every tree, except that of the tree of knowledge ; and that when Adam had eaten of that tree, he was driven from the Garden. The judgment was just and God-like, for the special law always supersedes the general law ; and in disobeying the prohibition, Adam forfeited his right to the enjoyment of the privilege.

So, in the case of the State's appointment of Electors, she is expressly prohibited from selecting officers of the United States ; it is finally for her own good that the exception is made, for in the day she does it she sows the seed of political death. Violating the prohibition, she must suffer the penalty of a loss of privilege, and the verdict is a righteous judgment which awards it.

Furthermore, under the common law rule she is debarred from taking advantage of her own wrong. If she has wilfully transgressed the organic law, what exemption can she claim over that of any other creature who has broken law ? None, but mercy, which there is no power to extend to her ; the Constitution must be executed *de rigore*, for its end is the national good, and to endanger that by clemency is to strain the quality of mercy.

Or, if she has sinned ignorantly, it is her own misfortune. The supreme law of the land was before her, and, if she has neglected it, she must suffer the penalty ; for, no one can take advantage of his own neglect.

And again, who can decide if it be *tort* or *laches* that is involved ? It may be the former, and she may plead the latter. The alternative opens up too wide a door for the entrance of frauds to be permissible for a moment ; the object of the provision is to keep out frauds, and it is not just to convert it into a means for their admission.

POWER OF APPOINTMENT FORFEITED.

But again, this prohibition is a positive limitation imposed on the State's power of appointment ; that is to say, not only does the State

forfeit her right to representation, but she forfeits her power of appointment by the same transgression.

This exclusive right of appointment, we have seen, is also a privilege in itself.* By it the State enjoys the right to representation, and it is against it in the first instance that the prohibition lies. Each State may appoint Electors, but no national officer shall be appointed, is the law. The illustrations and argument concerning the forfeit of the right to representation apply to the right of appointment as well.

But, appointment is something more than a privilege; it is a power, and the full significance of that term must be clearly grasped in order that the effect of the abuse of the power may appear.

It is not simply an act to be done, like voting for instance, or certifying, or signing, such as the Electors perform, and which are mere clerical offices, within the power of any one, if he please to employ them; but it is more like the electoral trust in its broadest sense, and includes the power of choice and determination and all the incidents appertaining to them. It is thus a political power of the highest grade, and means the complete constitution of a certain person as an Elector, who is fully empowered to cast the State's vote. It would be preposterous to hold that it means only the clerical act of canvass by a Returning Board, or certification by the Governor; and it would be just as unreasonable to hold that it means the larger power in one case, and the clerical act in another. Under the Constitution appointment means one thing only, viz., the plenary political power; and the certificates, etc., are merely the evidences of the appointment.†

Now, if the Constitution has limited that power by excluding officers of the United States, can such an officer receive an appointment? Manifestly not! He may be armed with a certificate, but that is only an evidence which may be traversed. That certificate may have been fraudulently obtained by an eligible person, and yet the appointment is invalid, and, even if given in good faith, it nevertheless does not confer an office on a man who, the Constitution provides, shall not hold it. To maintain that it does is to belittle the high political privilege, and reduce it to the altitude of a stroke of the pen.

* Chapter iii., page 44.

† Chapter iii., page 54.

The Decalogue commands, "Thou shalt not kill!" The prohibition is not against the mechanical act of taking life, which is done every day in defence of life, liberty, and law; but it forbids the high crime of a malicious, unjustifiable homicide, which mankind call murder. In like manner, the supreme law of the land has prohibited a State from appointing an officer of the United States to be an Elector; and it is not the mechanical or clerical act of appointment which is meant, but the investment of a high political officer with the authority to represent her. No Senator, Representative, or officer of the United States can receive that trust.

In commenting upon this prohibition, Justice Story regards it as a "disqualification" of members of Congress and officials of the nation, and adds that it "precludes the State from appointing" such persons to the trust. What trust? That of casting a vote? Manifestly not! The vote is the execution of the trust, whilst the trust itself is the high privilege of representing the State in choosing a President. The ineligibility of the proscribed persons follows as a matter of course, as he clearly sets forth in continuation:

"All those persons who, from their situation, might be suspected of too great a devotion to the President in office, such as Senators and Representatives, and other persons holding offices of trust and profit under the United States, are excluded from eligibility to the trust."

THE INTENTION OF THE FRAMERS.

In none of the reported debates of the Convention of 1787 was this immediate provision discussed, nor in the debates in the State conventions, nor in the arguments of the "Federalist" subsequently. When proposed in the Federal Convention, it was adopted *nem. con.*, and apparently as a well-understood and judicious exception.

But there is a parallel prohibition upon the other co-ordinate branch of the Government, the Congress, Art. I., Sec. VI., 2, which is precisely similar in its phraseology and in the effects flowing from it, whose construction is traceable in the Journal of the Convention, which was debated fully in that body and before the State conventions, and which is discussed in the "Federalist." Ascertaining the spirit and intent of this provision, we can argue exactly to those of the other.

"No Senator or Representative shall, during the time for which he

was elected, be appointed to any civil office under the authority of the United States," etc., and "no person holding any office under the United States shall be a member of either House during his continuance in office."

When Edmund Randolph presented the first plan of a Constitution to the Convention at the opening of its sessions, this provision was attached to it in a larger sense, as follows:

"Members of the Legislature to be ineligible to any office established by a State, or under the control of the United States."

On the 6th of August, 1787, after a long debate on the propriety of prohibiting Congressmen from thus holding offices, the principle was reaffirmed and the language strengthened, as follows:

"The members of each House shall be ineligible to, and incapable of holding, any office under the authority of the United States, during the time for which they shall be respectively elected."

August 14, when the subject was revived, Charles Pinckney, among others, argued strenuously against the use of the word "ineligible," and offered a motion striking out that word, and leaving them only "incapable"; but the motion was negative. Thereby it is proven that the intent of the Convention was to make them, not only incapable of holding an office, but incapable of being appointed to an office. The force of the word "ineligible" is thus clearly shown to be a bar to the appointing power, and "incapable" attaches to the member of Congress, if there be then the form of appointment.

But it is clear that if the Government cannot appoint to, the members cannot hold, an office; this is a legal inference, though some sophistry has been expended on the contrary view.* Therefore, when the "Committee on Revision" reported the clause back to the Convention, September 1, they had taken this view of it, and omitted the incapacity, whilst retaining the ineligibility; thus showing that both incapacities were designed to be included in the latter, as follows:

"The members of each House shall be ineligible to any office under the authority of the United States, during the time for which they shall be respectively elected."

September 3, Mr. Pinckney again advocated an amendment by substituting the word "incapable," but the question was voted down.

* *Vide page 101, and Chapter iii., page 62.*

There was no further change made in the extent or phraseology of the provision by the Convention, and it was thus left to mean, that no member of Congress should, or could, be appointed to such an office. It then went into the hands of a "Committee on Style," who reproduced it in the language first quoted, substituting the stronger negative for the original affirmative expression, and changing "shall be ineligible" to "no member shall be appointed."

From the building up of this carefully framed and extensively debated provision, we arrive at the exact significance which the Convention attached to the phrase, "No member shall be appointed"; and the value of this information lies in the fact, that in the electoral proviso the language exactly corresponds, and therefore must be exactly synonymous.

Firstly, it is obvious, the "Committee on Style" could not change the substance of the original expression; secondly, if they had changed its substance, the Convention, who had fought long and hard over its insertion, would not have accepted it, which they did subsequently without exception and by special vote; thirdly, it was the duty of that committee, in fact, to make the spirit of the provision clearer and stronger, if anything; fourthly, they did so by substituting the latter phrase in the exact sense of the original, and the Convention so understood it; fifthly, that sense was unmistakably, No member shall, or can, be appointed to, or shall, or can, hold, such an office; and sixthly, that is the clear intent which the constitutional provision must now be construed to affirm.

Luther Martin, a prominent member of the Federal Convention, in his celebrated letter to the convention of Maryland, setting forth the purposes and spirit of the Constitution, refers to this Congressional provision as follows:

"The clause, which prevented Senators or Representatives from holding offices in their own States, was rejected by a considerable majority; but, sir, we sacredly endeavored to preserve all that part of the resolution, which prevented them from being eligible to offices under the United States."

James Madison, sometimes called "the Father of the Constitution," writing in the "Federalist," No. LV., remarks upon this subject:

"But, fortunately, the Constitution has provided a still further safeguard. The members of the Congress are rendered ineligible to any

civil offices, that may be created, or of which the emoluments may be increased, during the term of their election."

Both parties thus translate "shall not be appointed" by the word "ineligible," and we know exactly the force and comprehensiveness of that term as employed by the Convention.

INELIGIBILITY MEANS IMPOTENCE.

There is a strong confirmation of the foregoing in the second clause of the provision which reads, "No officer, etc., shall be a member of either House, during his continuance in office." The language is not, "No officer shall be elected," otherwise he never could be elected, according to the meaning which the Fathers gave such a phrase; but the limitation is only upon his becoming a member, reserving to the States the right of electing him, and specifically reserving to him the right of resigning his office, in order that he may become a member, by the phrase "during his continuance in office." Here is a case then, wherein the Fathers show most emphatically, by reason of its proximity to the preceding total prohibition, how they would provide for an incapacity, which may be changed into a capacity by a resignation.

Add to the foregoing the following, and the case is made out. When the proviso regarding Electors was proposed in the Convention, July 20,* the phraseology ran: "Electors shall not be members of the National Legislature, or officers of the Government"; meaning, they may be appointed, but they shall not act, and if they desire to act they must resign the office. When, however, it was further considered, September 6,* the language was changed to "No person shall be appointed an Elector, who is an officer," etc.; thus passing the act of voting, the right of resigning and the act of appointment, and prohibiting all of them.

The same construction must then be made of the Electoral, as of the Congressional proviso; and, translated as the Fathers intended it to signify, it will read:

No Senator or Representative, or officer of the United States, shall be appointed, or can be appointed, an Elector; and no such person, if even the form of appointment be gone through, shall hold, or can hold, the office of an Elector.

* Appendix, "Journal of the Convention," July 20 and Sept. 6.

Whereby we see that the Fathers designed the proviso to mean precisely what an analysis of the principles underlying it proves that it must mean.

If a national officer cannot be appointed an Elector, then it follows that he cannot be an Elector,—that is to say, he may have the evidences of his *pseudo* appointment, but still he is not the constitutional officer denominated an Elector. An Elector must have all the necessary qualifications, but this man has a positive disqualification by constitutional edict.

If he cannot be an Elector, then he cannot cast a constitutional vote; this follows of necessity from the foregoing. The man may put in the ballot, but it is not the legal or valid vote of an Elector, and it has no more value in electing a President than the vote of any other impotent person, who may please to deposit a ballot and transmit it to the President of the Senate.

The simple standard of the Constitution, the proviso attached to this clause, is applied to the vote, and its validity tested. It is rejected not because it is not a *prima facie* vote, but because it was cast by a person who had no legal authority to cast it; an officer of the United States cannot be an Elector and cannot cast a vote, and the vote is therefore null and void.

THE UNITED STATES REJECT THE VOTE.

The general principle thus demonstrated is, that no national officer can be appointed an Elector, and that the vote of such an appointee is invalid; and the rule is, that it must be rejected.

The next question arising is, Who shall reject this invalid vote? Manifestly the United States; for that end a Government is instituted. The national privileges may lie in abeyance, if the United States do not see fit to make use of them; the national power may be latent, if no occasion arise to evoke them; but the national duties must be always quick and operative, and the national authorities are the constituted agents to enforce the provisions enjoining them.

Who must be the immediate agent in executing these provisions will be discussed hereafter;* in the mean time, the general fact remains, that it is the United States that are responsible for every part of them which concerns the national interests.

* Chapter vii., Opening the Certificates.

If the violation of a specific prohibition imposes a penalty, the State has laid it on her own shoulders, and the United States must see that she bear the burden, and that the nation do not carry it for her. Her right to representation being forfeited, the United States must see that she have no representation.

How shall this be done? Shall the State be left to execute her own sentence? Clearly that is not wise. Shall the authorities place themselves in the attitude of a judge at quarter sessions, as did the "Commission," and demand proofs, as if an Elector were a criminal on trial before it? Clearly that is not their situation, for no one may adduce the proofs, and thus the fraud may become effective.

Rather, the United States stand in the stead of an officer of the law (that is an exact description of their duty), who knows the law and his duty under it, and who stops every violation of it which he sees; and his further duty is to see, and to that end keep careful watch, lest the public interests be imperilled.

In the case under consideration, the officials of the nation are within its own knowledge and control; it commissions them and it pays them, at first or second hand. If, therefore, it hear an adverse report against an Elector, it is possible for it to obtain exact information of the facts, and treat his vote accordingly.* It would discharge one of its own District police, who, hearing that a thief was stealing into a house, would refuse to visit the locality and see if the report were true; and its own duty and responsibility are just the same, no more, no less. It is firstly its duty to look for frauds against the Presidential election, and, failing to find them, if it be notified of one in Florida, or in any other State, it is its duty to go there and investigate the facts, as it did when the Postmaster-General gave the fact of the resignation of Watts in the Oregon case to the "Commission."† If an electoral thief is trying to break in and steal the honor of the nation, it must bar the way and stop the thief; and it is not the part of wisdom to allow the alleged thief to state his own case and deny the charge, unsupported, as the Florida Elector did, when the allegation is made against him.

If the appointed authorities refuse attention to this duty, certainly no one else will execute it. The State will not, for she thereby loses

* Chapter iii., page 69.

† Vide page 105.

a vote ; the officer will not, for he is bound closer to his party than to his principles ; and the organic law may therefore be violated deliberately, over and over again, as no doubt it often has been, unless discreetly and carefully executed by its own appointed agent.

THE DECISION ILLEGAL.

In neglecting the important office thus devolving on them, as representatives of the nation, the "Commission" erred ; and their ruling, that evidence must be adduced by outside parties in order to prove an Elector an officer of the United States, was radically wrong.

The decision was entirely inconsistent also with another set down in the same paper, in which they decided it unlawful to go into evidence "*aliunde* the certificates." Thereby they ruled, very properly, that they were not a judicial body, so that nothing remained for them but to be an official body, to execute the organic law.

But they refused to execute it, and, as a result, they became in effect a political threshing-machine, with electoral votes to work upon, which threshed out the wheat to the Republicans and the chaff to the Democracy.

THE LOUISIANA CASE.

In their determination of the Louisiana case the "Commission" reported to Congress as their decision, in respect to the alleged invalid vote of an officer of the United States, as follows :

"The Commission is also of the opinion, by a majority of votes, that it is not competent to prove that any of the said persons so appointed Electors, as aforesaid, held an office of profit or trust under the United States at the time when they were appointed, or any other matter offered to be proved *aliunde* said certificates and papers ('purporting to be certificates')."^{*}

There are certain curious inconsistencies in this ruling, when compared with that in the Florida case, which would be amusing, were they not connected with so grave a proceeding as the fraudulent seating of a President.

Firstly, they now regard it as "not competent to prove" what, in the former paper they declare "the evidence does not show"; that is, they reject evidence here, which they accepted or were willing to accept

* Appendix, "Annals of Congress," 1877.

there; and they now declare unlawful, what they then decided to be lawful.

Secondly, they herein employ the expression "appointed Electors" as referring to the time and act of certification by the Governor, as is shown by the fact that they have rejected all evidence "*aliunde* said certificates"; whilst, in the former case, as was noted, the time and act referred to were the popular election.

Thirdly, in the Florida report, they refuse to decide as to "the effect of the vote of an ineligible Elector," and, in the Louisiana report, they do decide that it must be received and counted.

That a body of such learned men should, within a few days, make two such radically diverse rulings, is an indication that the end in view was not the execution of the Constitution, but the "counting in" of a Presidential candidate.

They are indeed consistent in adhering to their resolution to be neither a judicial body, nor an official and executory body, and in being a nondescript Returning Board for the advancement of an unscrupulous partisan policy.

EVIDENCE "ALIUNDE THE CERTIFICATES."

The point of the decision however lies in the rejection of *aliunde* evidence, and the prime blunder of the "Commission" consists in regarding evidence, that an alleged Elector is an officer of the United States, as being "*aliunde* the certificates."

It has already been shown that the duty of the United States in the premises is that of an officer of the law, to execute it, and that the law is clear that none of their own officials shall be Electors. To shut their eyes then to the proof that one of their officers is acting as an Elector, is to evade the law, not to execute it.

But, in pursuing this analysis of their decision, it shall stand upon the ground where they have placed it, viz., "upon such evidence as by the Constitution and the law named in said Act of Congress is competent and pertinent to the consideration of the subject." Occupying that ground, they hold that the evidence of an alleged ineligibility is not in the certificate, and that it is not competent to prove it by evidence *aliunde* the certificate.

Now, there are certain specific provisions touching the votes of the Electors, which must be executed faithfully before counting them, be-

cause they all concern the purity and honesty of the Presidential election. Among these are the following, prescribed by the Constitution and laws,* concerning which questions must arise at the opening of every certificate, or the disclosure of every vote, viz.:

Is this certificate from a State? Is the State entitled to this number of Electors? Is any one of them a Senator, Representative, or officer of the United States? Is one of the two persons voted for not an inhabitant of the same State? Is the list of the votes duly signed and certified? Have the Electors assembled as directed by the Constitution? Were their ballots cast on the day directed by Congress? Is the person voted for a natural-born citizen of the United States? Is he thirty-five years of age? Under the law of 1792, is the certification made by the Governor of the State? And, was the certificate delivered to the President of the Senate by or before the first Wednesday in January?

Every one of these questions must arise, be acted on, and determined before a single vote is counted; for they refer to specific injunctions of the Constitution, which cannot be ignored except by a flagrant violation of it. And more, they always do arise, either openly or tacitly, and are categorically decided. In the late election every one of these arose, in one of these two ways, and was determined according to the facts, except in the case of the "ineligible Electors," where the "Commission" refused to ascertain the facts. It argues either the possession of little acumen, or the assumption of a factitious mental obliquity, when they ignore this particular custom and duty, sanctioned by their own practice in the other instances.

To be sure, most of these questions were settled in the minds of the members at the date of the nomination of the respective Presidential candidates, nine months before; but nevertheless they were bound to come up, constructively at least, at the Opening of the Votes, and have an official settlement then. In this business of opening electoral votes the national agent is not, like any ordinary individual, or the Congressional tellers, for example, simply performing a certain mechanical ceremony; he is an authority, representing the people, canvassing the votes and declaring the result. The act is a grave, responsible, official duty, and must be performed in strict accord with the organic law.

* Appendix, "Constitution of the United States," and "Act of 1792."

When therefore Congress, or the "Commission" in their stead, began an examination of the votes of Louisiana, they had to decide in some way, and they did decide officially, though possibly without discussion in all cases, 1, that Louisiana was a "State"; 2, that she was entitled to eight Electors; 3, that they met together, as an Electoral College, in Louisiana; 4, that they balloted for President and Vice President on the 6th day of December, 1876; 5, that their certificates were in the hands of the President of the Senate by the 3d day of January, 1877; 6, that these certificates were made according to the forms of law; 7, that Hayes and Wheeler were natural-born citizens; 8, that one of them was not a resident of Louisiana; 9, that they were over thirty-five years of age; and 10, that William P. Kellogg was the Governor of Louisiana.

That they did so decide is evidenced by their categorical report, "that the votes named in the certificate of William P. Kellogg, Governor of said State, are the votes provided for by the Constitution, and that the same are lawfully to be counted for Rutherford B. Hayes, of Ohio, and William A. Wheeler, of New York."

Now, how did they procure the *data* to prove all these facts? Not one of them can be decided officially by the certificate alone. Those certificates are merely evidence, and they may be fraudulent, or may issue from a Territory, or contain votes for foreigners, or show on their face that they are otherwise not according to law. Therefore other sources of information must be appealed to, and the "Commission" did appeal to them; and when they did so, they accepted evidence, which, at the same time, they declared to be "*aliunde* the said certificates." For example, they must have obtained the facts that R. B. Hayes is thirty-five years of age and a native-born citizen from their own store of official knowledge, otherwise they could not affirm that the votes were "lawfully to be counted" for him; and that source of proof would certainly be *aliunde* the certificates.

THE DECISION ILLEGAL.

If therefore in ten instances they go outside of the certificate for proof of the lawfulness of the votes, how could they consistently refuse to go out of it in order to ascertain that it was lawful in the eleventh instance "provided for by the Constitution"?

The eleventh case is that an electoral vote is unlawful if cast by a

Senator, Representative, or officer of the United States; and it was just as incumbent on them to know the facts here, whatever the source of their knowledge, as it was in the other ten. It was their duty indeed to ascertain the facts as to this provision of the Constitution, whether it were brought to their attention or not, as honest officials honestly executing the law.

A *reductio ad absurdum* may be readily made of this decision. The question before the "Commission" was as to the validity of the votes as certified; that is, the certificate itself was delivered to them by Congress for trial, and was tried and passed upon according to their own showing. Yet they refused *aliunde* evidence, and declared that the certificate itself was conclusive evidence of the legality of the certificate; which is certainly a novel method of proof.

THE EVIDENCE IS IN THE CERTIFICATES.

If the name of O. P. Morton, one of the "Commission" and a Senator of the United States, had appeared as an Elector in the certificate of Indiana, would the "Commission" have decided his vote to be valid? Under their ruling they must have done so, though he was known personally and officially as a "Senator," who is expressly prohibited from voting for President. But in fact neither Congress nor the "Commission" would have dared to face the opinion of the world by upholding so flagrant an infraction of the Constitution. Where then would they have obtained their proof of a violation of the law in such a case? Manifestly not *aliunde*, but in the certificate, which recited Mr. Morton's name. This explanation, then, introduces the true construction of the duty of the Government, or of the "Commission," in canvassing the votes of the Electors.

The United States are not required to act as a clerk, to report to the people what certain certificates contain; it is, as the representatives of the people, of sovereign power, knowledge and wisdom, that they are to take the law of the land and see that the certificates do contain what that law requires.

The people elect a President only when they comply with the laws. The United States do not execute the certificates, they execute the Constitution; and when the certificates comply with the Constitution, they execute themselves. It is the votes which declare the President.

And the proofs, that the votes comply with or break the law, are to be found *in* the certificates and not *out* of them.

Therefore if Morton's name appear therein, the nation knows that he is one of its Senators, forbidden to vote as an Elector, and the vote is rejected ; if Victoria Regina is voted for as President, the nation knows that that is not the name of one of its citizens, and the vote is rejected ; if a certificate comes from Montana, the nation knows that that is not one of the States, and its votes are rejected ; if the Electors' votes are cast on the 1st of February, the nation knows that that is not the day directed by Congress, and the votes are rejected ; if John Smith signs a certificate as Governor of Louisiana, as he did in the recent election, the nation knows that he is not the Executive of that State, and the certificate is rejected. The United States are ubiquitous in law, and their agent, opening the votes in their stead, must represent them in this, as in every other needful qualification. He is not an individual, but the State, for this special occasion, and is bound to take official notice of all officers of the United States and of all public matters pertaining to a Presidential election. Possessed of this knowledge he examines the votes of the Electors, and finds the evidences of their shortcomings in the certificates themselves, as they are tested by the scale of the law.

Curiously enough, too, the certificates are provided by the Constitution and the Act of 1792 as evidence, and the legal evidence required at the opening of the votes ; they always have been regarded as evidence by Congress, and they were relied upon as evidence by the "Commission" in other decisions.

To execute the specific provisions of the law in such cases is not an interference in an election by the Government, or by Congress ; a vote cast by an officer of the United States is not valid, and the Law rejects it by the hand of its minister. To canvass the votes thus is very different from that interference in the affairs of an election, which would arise from a canvass of the State polls in the settlement of a local dispute. In the latter case the national agent would be a judge, deciding on the facts of the election of Electors, as it unlawfully did in the Oregon case ; in the other and legitimate one, he is an official, executing the laws of the land, in preservation of national interests.

The provisions and prohibitions of the Constitution are designed to

be clear and binding upon the people, States, Government and officials, and none of them may be legally ignored or broken. Some of their violations must be investigated by the Courts, and others by Congress; but others, again, require no judicial examination, and must be officially or ministerially dealt with. Among the last is the prohibition regarding the appointment of an officer of the United States as an Elector; the facts are all matters of record, and the case requires no trial and judgment, but a simple examination by the law, and rejection of the vote in accordance with it.

Many other parallel cases occur under the Constitution, among which are, for example, the following,—“the Vice President of the United States shall be President of the Senate”; in the Senate, “when the President of the United States is tried, the Chief Justice shall preside”; “every bill shall, before it becomes a law, be presented to the President of the United States.” These provisions must be and are executed by the Government at once, without resort to the solemn farce of requiring proof, and the officials of the United States must know the facts on which they depend for lawful execution.

Therefore, if John Doe were to present himself as the Vice President, it would not be lawful to let him preside over the Senate, and decide his acts meanwhile to be valid, until such time as his right to the office can be investigated; the Senate, as part of the Government, must know the Vice President at once and officially, and resist the claim, because he is in fact not the man. So it is with the Chief Justice and the President, in the other two cases; they must be known officially as a part of the Government itself. And so it is precisely with the case of any minor officer of the nation who presents himself in the proscribed character of an Elector.

“CERTIFICATES” AND “LISTS.”

Having established this principle, it is in point to clear up the confusion which has led to its frequent infringement; for there was a possible confusion in the minds of the “Commission,” and there is a palpable confusion in the minds of the people at large.

The embarrassment arises from the false interpretation put upon these “certificates,” as an analysis of them will demonstrate.

By the Constitution the Electors are required to prepare and trans-

mit to the President of the Senate "lists" of their votes.* In common parlance and, strange to say, by Congressional custom, these *lists* are denominated *certificates*; which is without any warrant in reason or law, the constitutional, technical and legal term being "Lists."† When that fact is clearly grasped at the national Capitol, there will be an end to more than one difficulty in the way of a simple and natural execution of the Electoral System, as will hereafter appear.‡

These Lists contain the following *facts*, in accordance with the requirements of the Constitution, to wit, the names and residences of the persons voted for as President and Vice President, the number of votes for each and the names of the persons casting the votes, which last are specifically made part of the Lists and not of the Certificates. And these are all the facts that they do, or at least all that they need contain.

Under this List is written a Certificate, containing the following *facts*, by direction of the Constitution, to wit, that the above votes are cast on the appointed day, agreeably to law, and that they are cast by the persons whose names are attached. And these are all the facts which are therein required.

Attached to this certified List, as provided by the act of 1792, is a Certificate from the Governor of the State whence the List issues, which contains the following *facts*, to wit, the names of the Electors, the date on which they were chosen, agreeably to the State law, the fact of appointment, and the signature of the Governor. These are all the necessary facts, and to them should be affixed the Seal of the State, if there be one.

Upon the outside of the Lists, after they are sealed up, is certified the "State" whence they issue, signed by the persons whose names are within, in conformity with the act of 1792. The purport of this certification will be duly discussed hereafter.§

When the Lists have been received and are before the two Houses, the first business is to ascertain if the day on which the votes were

* Chapter v., "The Electoral College."

† Heretofore the term "certificate" has been employed in its usual sense, in order to avoid confusion, but henceforth both Certificate and List will be used in their technical sense.

‡ Chapter vii., "Certificates and Votes," and "Opening as Unclosing Lists."

§ Chapter vi., Receiving the Lists.

cast was the day prescribed by Congress. When the Lists are opened, those containing votes cast on the prescribed day are received,—the others rejected.*

The next thing that appears is the Governor's certificate, with its facts, its signature, and its seal. The seal authenticates the signature, the signature authenticates the certificate, and the certificate is the appointed and conclusive evidence of the facts contained in it, viz.,—the names, date, and appointment in compliance with State laws. These facts the United States cannot question,—they are decided.

But another question arises, namely,—“Are these the persons who cast the votes?”

Next, the certificate of the voters appears, which is the appointed and conclusive evidence of the facts contained in it, viz.,—that they have duly and lawfully cast the above number of votes for the persons specified. These facts the United States are precluded from questioning,—they are determined by the certificate.

An examination of the names attached to the List determines the identity of the persons signing and the persons certified to by the Governor, and that question is disposed of.

There remain, then, the facts on the Lists. The point to be ascertained is the validity of the votes set down, and that depends on their compliance with the Constitution. If they do comply, then they elect a President and Vice President; and the way in which their validity appears is, not by a trial and judgment, but by a canvass, the application of the law to them, the execution of the Constitution upon them.†

When a judge is trying a case, his duty is to hear and determine the evidence, according to the rules of law, accepting only what is competent. He is then in the act of receiving the legal evidence. But when the evidence is all in and he pronounces the sentence, he is acting as the representative of the majesty of the Law, executing it according to the evidence received.

But in the case of the votes of the Electors, it is not the function of the United States to weigh and determine evidence. By prescription of the Constitution and laws, the conclusive evidence is in. As has been shown, the certificate of the Governor authenticates the appointment of the Electors, the certificate of the Electors authenti-

* *Vide Senator Douglas on this point, Appendix, “Annals of Congress,” 1857.*

† Chapter v., “Official Relationship.”

cates their action, and the recorded and proven facts on the Lists are now the evidence of the validity of the votes. The United States, or their official agent, being the executive of the law, take the law and the recorded facts, and by them execute the Constitution upon the votes. This is a canvass.

When the List is opened, there are, then, three facts, three items of legal evidence on its face,—the number of votes, the names of the persons voted for, and the names of the persons voting, and to these three facts the law is applied. The ballots cast in the several States are in question; they were the votes of the Electors, and the point to be determined is, Are they electoral votes? They are if they comply with the law, and the record in the Lists, certified as aforesaid, is the *evidence* to the Government of their compliance or non-compliance.

For example, the certified List from Louisiana is before the agent of the nation, and it records eight votes cast for Hayes, of Ohio, and Wheeler, of New York, by the eight persons signing it. There are but three questions that can possibly arise at this juncture, to wit: Is the State entitled to this number of votes? Are the persons who cast them lawful Electors? and is one of the persons voted for a non-resident?

As to the first the Law says that Louisiana shall have eight Electors, and the eight votes recorded are the *evidence* that the law is complied with. As to the second, the Law says, "No officer of the United States shall be appointed an Elector," and the record shows that Levissee and Brewster, who were officers of the United States at the time of the appointment, have cast two votes; therefore, the law being violated, the votes are rejected. As to the third, the Law says that one of the two persons voted for must not be resident in Louisiana, and the record shows that the law is complied with. There are therefore six electoral votes from the State of Louisiana for R. B. Hayes, of Ohio, and W. A. Wheeler, of New York.

These lawful votes now represent the choice of the lawful Electors, and the only question arising is, Is that choice lawful? That depends on the eligibility of the persons chosen, and their eligibility has been taken official cognizance of at the date of the nominations, or since. If eligible the valid votes are counted for them, and if ineligible they are not.

It is thus apparent that at this juncture,—the canvass of the votes,

—the evidence is all to be found *in* and not *aliunde* the Certificates and Lists.

Or, examining the question from another stand-point, the same result will appear.

The election of President by the Electors is different from all other elections. In other cases the persons voting meet together and elect *viva voce*, or by ballot, completing the act and declaring the result at one time; or, as in popular elections, their ballots are received by appointed officers who are judges of the election, and canvassed and returned by the appointed canvassing officers or boards, and so reach the seat of government as established facts. But in the election by Electors, there are no supervisors, they are divided into small assemblies in thirty-eight States, and they cast their ballots in secret. Further, they make their own returns to the seat of government, not as established facts, but in the shape of certified Lists of their votes. Now, they have an indefeasible right to elect a President, but they must elect him agreeably to law; they are executing the Constitution, and the United States must see to it that they execute it lawfully.

But, their ballots were cast two months before the day for Opening the Votes, and the Electors are officially defunct. There is nothing to exhibit the legality of their ballots, except these records, the Lists certified by themselves; and these Lists thus become to the nation the evidence of the validity of the votes which the Electors have cast.

EVIL RESULTS OF THEIR RULE.

To glance briefly at the “Commission’s” decision from the opposite side: if evidence that an alleged Elector is an officer of the United States, be evidence *aliunde* and not competent, then the constitutional provision under discussion is a nullity; for we have seen that the State has a right to a representation, except when she appoints an officer of the United States to represent her; and we have seen that the United States must receive her appointed Electors, whilst the State certificate is their only necessary authentication. Preparing them with these credentials, every State in the Union may appoint her Congressional delegation as Electors, in open defiance of the Constitution, and procure their complete, though clearly unlawful, recognition.

Furthermore, a President, desiring re-election, might openly buy up

the legally-appointed Electors by commissioning them to offices, and their votes for him must nevertheless be accepted, under this ruling. The State certificates in this case would be good, but the Government would be debarred from using information in its own possession, to show that the votes of the Electors are void.

Or, a State may deliberately and with fraudulent intent appoint ineligible persons as her Electors, and have a practical recognition of them in defiance of law, enjoying a right which she has forfeited, and over-riding the Constitution of the nation.

THE COMMISSION'S "GROUNDS" ANALYZED.

Heretofore we have examined the decision of the "Commission" solely on the import and consequences of the language of their official report; but on the 19th of February, 1877, Mr. O. P. Morton, a member of the "Commission," in an address to the Senate, gave the "grounds" of their decision in the following words:

"The Commission decided that it was not competent to prove that certain Electors were ineligible on the 7th of November, the day of the election. They decided that upon two grounds.

"First, Because, in any point of view, the proof would be immaterial; for the substance of the Constitution, the spirit and meaning of it, is that the Electors shall be eligible when they come to act, when they come to vote, and not at the time when they are elected. A Senator must have certain qualifications: if he has them when the time comes to be sworn in, that is enough; it is immaterial whether he has them on the day of the election.

"Second, If it were conceded that an Elector was ineligible on the day he voted, can that fact be proven to strike out his vote? A man may be ineligible to a seat in this body, he may not be thirty years old; if he come here and is sworn in and takes his seat, he may afterward be turned out on proof of that fact;—but every vote that he has cast has the same validity with the vote of every other Senator."

As to these "grounds" of decision, they certainly could not have blinded the legal sight of the "Commission," however insidiously urged to hoodwink the public eyes.

1. There is but one "ground," instead of the two artfully suggested, and that is the "immateriality of the proof," wherefore the "Commission" decided it to be "incompetent." Reduced, the argument

runs: It is immaterial that a Senator be ineligible on the day of his election, if he be eligible when he is sworn in; and if he be ineligible when he is sworn in, nevertheless his votes are held to be valid; therefore it is immaterial that his ineligibility be proven.

2. We are inducted into the secret of the peculiar process by which the "Commission" reached their conclusions. The decision was, that proof of matter outside of the certified lists is "incompetent"; and it was reached by bringing in that proof and showing it to be "immaterial"; as if they had said, It is not competent to go out, because one finds nothing when he does go out. This is not a process remarkable for its logical method, however strictly it may follow political customs.

3. The real argument is a paralogism, and, when analyzed, no conclusion can be drawn from it. Its substance is: A Senator must be eligible when sworn in; when sworn in his votes are valid; therefore —what? Nothing!

4. Its exquisite logic transpires further from the following consideration. In the example of the "ineligible Senator," which is the sole basis of the argument, it is the man's personal qualifications that come in question; and because his vote is regarded as valid, therefore it is proposed to apply the same rule to the vote of an "ineligible Elector." It is obvious that the *votes* of an "ineligible Senator" have nothing to do with his trial, but are decided to be good, whichever way that issues; whilst in the electoral case the whole point at issue is the validity of the vote. It is under examination, and to scrutinize it both Houses of Congress are solemnly assembled; the Elector is *functus officio*, and can never be under another examination; his whole duty has been centered in casting that vote, and it lies there now for judgment. The reason of the public is appealed to to let that vote pass, cast by an ineligible man, thus far untried, who cannot be tried, and the effect of whose vote can never be recalled; because, forsooth, a Senator may be tried for ineligibility after he has cast a vote, held to be valid from motives of policy. The argument is as preposterous a one as ever issued from Senatorial lips.

5. The argument is equivalent to the affirmation that "two wrongs make a right." Any unprejudiced mind will take Mr. Morton's premisses and reach very different conclusions, by force of the irrefragable rules of logic, as follows: A Senator must be eligible when he is sworn in; he is often sworn in when he is ineligible; therefore his induction

is illegal : or, The Constitution has prescribed eligibility to membership ; his membership is acknowledged when he is ineligible ; therefore the Constitution is violated.

6. Summed up, the spirit of the argument is, An ineligible person is often sworn in as a Senator ; yet his votes are counted, until he is ousted ; therefore there is no propriety in proving him ineligible. That practice may be sanctioned by the United States Senate, but certainly can never be approved by a person who has regard for the morality incumbent in legislation, as anywhere else. Applied to the electoral case, it means just this : John Doe is an officer of the United States, and therefore cannot cast an electoral vote ; but he has cast a vote, which is handed in to be counted ; let us therefore count it, and elect our man, for no one can change the result.

It is no wonder that it made a partisan Returning Board out of the body that used it.

7. The statement, that "the spirit and meaning of the Constitution is that the Electors shall be eligible when they come to vote and not when they are elected," must be taken *cum grano salis*. As has been heretofore set forth, and as will be further developed,* persons need not be eligible at the time of election, but they must be eligible at the date of appointment ; consequently it is not necessary that they be eligible only "when they come to vote." But Mr. Morton indubitably meant "appointed" when he said "elected," as is shown by the phraseology of the "Commission's" decision and by the tenor of his illustrations and argument ; and he artfully substituted "elected," in order to draw effectively the comparison of the election of a Senator, which was relevant as to an election, but totally irrelevant as to an act of appointment.

8. The ineligibility does not extend to the election of a Senator, because the Constitution attaches it only to his membership, by the phrase "no person shall *be* a Senator," etc. But, in the other case, the Constitution has distinctly provided, "No Senator shall be *appointed* an Elector" ; so that the prohibition relates back of the vote, and back of the trust, to the act of appointment. Therefore the argument is irrelevant.

9. The disqualification of the Senator is a personal one, depending

* Chapter iii., page 69, and iv., pages 77, 82 and 102.



INELIGIBILITY.

on his age and residence, which are matters of fact, and which may require a trial and judgment, and the Constitution has authorized the Senate to decide them. But the electoral disqualification is a matter of record, which is not to be tried, but which must be known by the Nation and applied to the case at the opening of the votes.

10. *De jure*, an ineligible person cannot be either a Senator or an Elector, whatever he may be *de facto*. In the former case, the votes are held to be valid only because, under the illegal customs of the Senate, he has been casting them for weeks, mayhap months, and it would possibly disarrange and disrupt legislation to an undesirable degree if they were thrown out. This is a matter of policy. It is not the law, but a rule of the Senate, and in clear violation of the Constitution. But Electors are not Senators, and the production of the rule in this instance was an act of impertinence. If it proves anything whatever, it is this;—that the vote of an Elector should not be counted until this eligibility is tested, in like manner as should the eligibility of a Senator be tested.

11. In the case of the Senator, his recognition is the formality of taking the oath; in the case of the Elector, it is the reception of his vote. It is clear that John Smith, of Louisiana, cannot constitute himself an Elector; nevertheless he did so recently, and when his vote was opened, it was not accepted; that was the only point at which the vote could be tested, and it was then rejected by universal consent. And thus, in respect to his official connection with the Government, the Elector is tested at the same juncture, and shown to be a member of the Electoral College, or not a member of it.

12. If found to be not an Elector, certainly his vote should be rejected; for the result of that vote is not, as it probably is in the Senate, an assent to some point of policy, or an indorsement of some rule of action; but it may become, as it did in the last election, the mighty authority which seats a President of this nation for four years.

13. The argument was never, in fact, applied to the case in point by the speaker, except in the exceedingly non-committal way of affirming, "In applying it to Electors, we apply a simple and well-settled rule of law." It was left to the minds of his auditors, confused already by the insidious sophistry of the illustration, to apply it at leisure; which they doubtless did as designed, for the newspaper correspondents state that it created "a marked effect."

A SECOND IRRELEVANT EXAMPLE.

The second example adduced by Commissioner Morton, and often employed by others in this case, was the following:

"A man may be ineligible to be appointed a judge, under the XIV. Amendment, or for want of age; yet, if he is appointed, every act of his as judge is just as valid as if he had been eligible."

The conclusion of course is, Therefore count in your President by ignoring the fact that one of his Electors is ineligible.

Let us place the two ineligible persons in a like position, and the fallacy of the argument becomes apparent at once.

1. A person, holding an office of profit and trust under the United States, has been elected, in ignorance of that fact, and bears the Governor's certificate as an Elector; under that fictitious character he casts a ballot for President, which is sent to the seat of government, and is in the hands of the President of the Senate; it is the Government's bounden duty to see that no votes from national officials are received; for the first time the opportunity arises to test the fact of his eligibility, and an objection is made to the vote because its caster is an officer of the United States. 2. A person, who is under the ban of the XIV. Amendment, is, in ignorance of that fact, nominated by the President to a seat on the Supreme Bench; the papers are made out *in propria forma*, and are in the hands of the President of the Senate; it is the bounden duty of the Government to see that no ineligible judge is appointed; the President of the Senate is about to put the question of a consent to the nomination, when an objection is made because the candidate is covered by the XIV. Amendment.

What must be the result of such objection in the latter case? Will the Senate argue, It has been decided that the acts of an ineligible judge are as valid as those of an eligible one; therefore it is immaterial to show his ineligibility,—let us confirm him? Unquestionably not; it would be the rankest kind of law-breaking. Then why should they do so in the parallel case of an ineligible Elector?

It is vain to say that the Elector has been appointed and has cast his vote, for that is the exact question at issue: Is his ballot a "vote"? If he be ineligible, he has neither been appointed nor has he cast a constitutional vote.

The fallacy consists in denominating his vote as *de jure* valid, before his eligibility has been tested to show its validity.

The vote of an Elector appears before Congress, desiring to enter the sacred citadel of the American Electoral College ; it has either a plenary right there, or it has none. The national agent is the sentinel at the gateway, whose sovereign ruler, the Constitution, has provided him with certain countersigns. As a good officer, he applies each one of the tests strictly before he will permit a single vote to pass.

But again, let us suppose that both these ineligible persons have received their commissions, whether by fraud or ignorance, and that the Judge has taken his seat on the bench while the Elector's vote has been accepted. Now, the Judge's acts are held to be valid, and, it is also agreed, the Elector's vote must be counted ; not because they are not unconstitutional, but because public policy demands their present validity. And so the often-quoted argument dwindles to empty nothingness when tested by an actual, and not a fictitious, comparison !

ANTICIPATING THE ISSUE IN OREGON.

One of the arguments of the "Commission," as set forth by Mr. Morton on that same occasion, is, "The spirit and meaning of the proviso is, that Electors shall be eligible when they come to act, and not when they are elected." The spirit and meaning of this argument is, that an officer of the United States, being elected to be an Elector, may resign his office and so become eligible ; and it seems to have been gratuitously introduced into the Louisiana discussion in anticipation of a case of that kind to arise subsequently in the vote of Oregon.

The Constitution has nothing to do with the "election" of Electors ; it only concerns itself with the power and the act of "appointment."

By whom the act of appointment is to be performed has never been settled categorically, but, as has been seen, it can only be done by the Governor of the State.*

Had this rule been generally understood in the recent election, it would have prevented a great many fears and anxieties, and doubtless a great deal of intrigue and corruption ; for the popular vote for President was so close in November that every officer of the United States, who had been chosen, was singled out before the completion of the

* Chapter iii., page 54.

canvass ; and then there was a general resigning of the electoral trust, in order that the State law might operate, or resigning of office in hot haste, where there was no State law providing for the defect ; and in Oregon particularly the result was a very unique and interesting situation.

In the Oregon case, J. W. Watts, a Republican, was a deputy postmaster when elected or chosen, and he resigned promptly when he discovered his ineligibility. The Governor of Oregon, being a Democrat and having his party interests at heart, determined to ignore the wishes of the district which chose Mr. Watts and certify the election of his opponent, on the ground that the latter had had "the highest number" of votes.

All this "sharp practice" might have been avoided if the rational ground had been occupied, that the Constitution has not prohibited the election, or choice, of an officer of the United States ; and that his prompt resignation was a removal of his disability, wherefore the Executive could have and should have executed the wishes of the people, and appointed him by commission or certificate.*

RESIGNATION AFTER APPOINTMENT.

This, however, is not the position of the Commission, who cling to the untenable notion that the "election" is the constitutional "appointment." Therefore, in pursuing their argument, "appointment" will only be used as being, firstly, the technically proper word, secondly, as conveying their meaning exactly, and thirdly, as employed by themselves. They hold, then, that an officer of the United States, appointed an Elector, may resign his office and so become eligible to vote. Of course this has already been thoroughly discussed in an affirmative way, and it has been shown that it is eligibility to appointment, and not to the act of voting, that is intended ; but now a few of the disastrous results, which must ensue from such a practice, may be pointed out.†

1. It violates the letter of the provision and the scope which its authors intended it to have. We have seen that the phrase, "No person shall be appointed," was intended to mean an ineligibility to re-

* Chapter iii., page 54.

† *Vide* the opinion of the Senate in 1837, as expressed by their Committee, Henry Clay, Silas Wright, and Felix Grundy, as to the effect of such resignation ; Appendix, "Annals of Congress," 1837.

ceiving, holding, and executing the trust to be conveyed.* "The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms and the intention of the parties."

2. A resignation, with resulting eligibility, must proceed on the assumption that the appointment was legal; whereas the law has specifically proscribed the appointment of an officer of the United States, and it must therefore be illegal. The Constitution is thus defeated by a rule of practice.

3. If such appointment be legal, then two other constitutional principles clash. If the appointment be good, the United States cannot reject it; and yet they are required to reject the appointment of a national officer.

4. Therefore a resignation is practically unnecessary, for the United States cannot except to an Elector lawfully appointed. Regarding such an appointment as illegal, the difficulty here disappears.

5. The appointment, then, being considered unconstitutional, if the resignation purges its wrong, a State may be thus permitted to enjoy the effect of her own folly or her own criminality.

6. Not being a lawful Elector, if resignation of office may make him one, it is practically his own act, and not that of the State, which appoints him.

7. With the right to resign and vote, he may refuse to do so, and thus defeat the State's right to a representation, which she could make in correction of unintentional error, before the casting of the vote; and thus one man, with evil designs, is put in authority over a State.

The fact is, a lawfully appointed Elector becomes immediately an official of the United States by virtue of the national interests intrusted to him, as will appear more fully hereafter;† if he be not lawfully appointed, he is not such an official; and by no act of his own, such as resignation, or forgery, or petition, or voting, can he become an Elector. The United States, having full control over Electors in their official capacity, test his authority, and if it proceeds from any source other than the constitutionally prescribed one of an appointment by the State, both he and his vote are rejected, in this case, or in any case that may possibly arise. This principle is of universal

* Page 82.

† Chapter v., "Official Relationship."

application, and harmonizes with other well-known principles and practices, being the true one; whilst any other must infringe upon the Constitution, clash with others, violate the ordinary legal practices, and ignore justice and reason altogether.

THE OREGON CASE.

In their report of the Oregon case,* the pertinent parts of the "Commission's" decision are as follows:

"The three persons first above named (including Watts) were duly appointed Electors in and by the State of Oregon.

"The refusal or failure of the Governor (and Secretary?) of Oregon to sign the certificate of the persons so elected, does not have the effect of defeating their appointment as such Electors.

"The act of the Governor (and Secretary?) of Oregon in giving E. A. Cronin a certificate of his election, on the ground that the latter (Watts) was ineligible, was without authority, and is therefore void."

Just here may be added an extract from the report of the "Commission" on the Louisiana case:

"The 'Commission' has, by a majority of votes, decided that it is not competent to go into evidence *aliunde* the papers (certificates) opened by the President of the Senate, to prove that other persons than those regularly certified to by the Governor of the State, and according to the determination of their appointment by the returning officers for election in said State, had been appointed Electors; or, by counter-proof, to show that they had not."

We may also add an extract from a report of proceedings in the session of the "Commission," which has a bearing on the case:

"By Commissioner Thurman—Does the law of Oregon require the Secretary of State to give any decision at all, or does it require the Governor to give the evidence of the fact?

"Senator Kelly—Let me read: 'The votes for the Electors shall be given, received, returned, and canvassed as the same are given, returned, and canvassed for members of Congress. The Secretary of State shall prepare three lists of the names of the Electors and affix the Seal of the State to the same. Such lists shall be signed by the

* Appendix, "Annals of Congress," 1877.

Governor and Secretary, and delivered to the College of Electors at their meeting on said first Wednesday of December.'

"By Commissioner Thurman—Does the Secretary of State make out that list including the name of Watts?

"Senator Kelly—No, sir; it did not include the name of Watts. The decision upon the facts and upon the law was upon the interposition of a protest by a number of gentlemen to the counting of the votes for Watts. The Governor undertook to decide the matter, as he had a right to decide it, under the decision I have stated."

In the examination of this case, the "Commission" took the evidence of the Postmaster-General, that Watts was a deputy-postmaster on the 7th of November, 1876, and that he resigned that office on the 13th of November.

THE FACTS AND THEIR LEGAL EFFECT.

As to the facts in the case, they and their legal bearing may be briefly examined and digested, for they involve the simplest and clearest principles of the Electoral System.

Watts was a postmaster on the 7th of November, and therefore could not be appointed an Elector at that time. On that day, however, at a popular election of Electors, he received a majority of votes, and "the highest number of votes"; so that, under the law of Oregon, he was duly elected, and under the Constitution of the United States he was duly and lawfully "chosen." But thereby he was not "appointed," or invested with the trust, for as to that he was still a dead man legally, under the Constitution. His ineligibility being made known, it remained for him to resign his office and so remove it, in obedience to the desire of his constituents; or, for the State to appoint another and an eligible person; or, if no law of the State permitted the latter, for the State to lose the representation, because of her *laches*.

There was no statute providing for the contingency which had arisen, as it then stood; therefore, as regarded that alternative, the representation lapsed. But on the 13th of November Watts resigned his office of postmaster, and thus rehabilitated himself as to a constitutional eligibility to "appointment."

By the statute of Oregon, the process of appointing an Elector is a series of steps, from the ballot-box up to the certification by the Governor and Secretary of State; these steps are specifically described,

and there is no act, prior to the last, at which the appointment is declared to be complete. The votes are to be given, received, returned, and canvassed by the Secretary, showing the exact number of votes for each. (At this point another statute declares the person having the highest number of votes to be "elected"; but it does not stop the prescribed steps in his "appointment.") The Secretary is to make out the three lists, provided by the national law of 1792. (But it is not declared that these must contain the names of the persons elected; for if they were all deceased by this time, it would not be his duty, neither if they were legally dead; it would appear that the statute had purposely clothed him with some discretion, to meet contingencies unexpected and unprovided for.) The Seal of the State is to be affixed to these lists, and they are to be signed by the Governor and Secretary of State, thus concluding the business of appointing.

These certified lists are to be delivered to the Electors at their meeting on the first Wednesday in December, as the evidence or authentication of their appointment. This is the sole purport of such deliverance, and it is prescribed by the State as the formal authority to the Elector to act, and as the evidence to go to the United States, in specific compliance with the Act of 1792. The certificate therefore must be the ultimate and conclusive act of the State in appointing an Elector, and the only and conclusive evidence to the United States of such appointment, as well by the Statute of the State as by the Constitution.

If there be any such officer as a "returning officer," it must be the Secretary of State, who, after canvassing the votes, is authorized to prepare the certified list of the Electors. The clear intent of the law is, that he shall make such certificate in favor of the person elected;* but if the returning officer make an illegal return, as, it is alleged, the Louisiana returning officers did, nevertheless, if certified to by the Governor, the person named is the *de facto* Elector of the State, under the law of the State, as has just been seen, and a *de jure* Elector, under the national law of 1792 and the Constitution, as respects the United States.

In judging such a case the "Commission" preclude themselves from any interference with such lawfully-appointed Elector by their acceptance of the fraudulent returns of the Louisiana returning officers, and

* Chapter iii., pages 55 and 63.

by their decision in the Louisiana case, above quoted, that "it is not competent to prove that other persons than those regularly certified to by the Governor of the State, and according to the determination of their *appointment* by the returning officers for elections, were appointed Electors."

CRONIN A DE JURE ELECTOR.

Now, in the Oregon case, the canvass was completed on the 4th of December by the Secretary of State, and it showed that Watts had received some one thousand votes over Cronin, his Democratic opponent. Therefore, being legally elected, the Secretary and Governor were in duty bound to appoint him, provided he were not physically or legally dead. At that date Watts was neither, and was entitled to the appointment as justly and legally as were the alleged defrauded Democratic Electors in Louisiana; and any change in the names of the persons designated by the election could only be made by the grossest fraud on the rights of the people.

As a matter of fact, however, the Secretary made the certified lists required, omitting the name of Watts. Instead thereof he substituted the name of E. A. Cronin, sealed it with the State seal, and both he and the Governor signed it, and delivered it duly to Cronin. It thus became a legal notice to Cronin of his appointment, empowering him to act for the State in the Presidential election, and from that moment he became a *de facto* and *de jure* Elector and official of the United States, whilst Watts of course had no official authority.

At the meeting of the Electors, the two other certified Electors refused to act with Cronin, and therefore both he and they organized "Electoral Colleges," ostensibly under the law of the State empowering the Electors to fill vacancies at the time of their meeting.

All this was very ill-advised and ridiculous; for, firstly, there was no vacancy, since the three Electors, to which the State was entitled, were all there, and duly appointed; and, secondly, there is no such thing as an "Electoral College" under the Constitution, which Electors must organize thus or so in order to perform their duty.* Therefore the arguments before the "Commission" about "one or two colleges," "lawful and unlawful colleges," etc., have been so much in-

* Chapter v., "The Electoral College."

genuity wasted, and the carefully exact proceedings of the Oregon parties in organizing "colleges" an ignorant work of supererogation.

THE DECISION ILLEGAL.

The fact remains, that all three of the appointed Electors remitted their votes to the President of the Senate, two for the Republican and one for the Democratic candidate. They were contained in two several certified lists, but that was of no moment; in making them effectual in electing a President, it was eminently proper that the nation should ignore any errors or follies, receive the votes of the appointed Electors, and count them for the persons for whom they were cast. On the contrary, the "Commission" decided that Cronin's vote "ought not to be counted," as was expected; for that vote would have made Samuel J. Tilden the President of the United States.

The Commission, in stating that decision, affirm that it rests on a consideration of and judgment of the statutes of and election proceedings in the State of Oregon; whereby they admit that they usurped the authority of deciding for a State what is and what is not an election and appointment under her local laws.* They reverse their repeated refusal to prove or disprove anything by evidence "*aliunde* the certificates," and actually record, as part of their decision, that "the evidence shows that Watts was a postmaster at the time of his election."

* Since this work was submitted to the publishers, the following extract has appeared in the newspapers. It is from the pen of one of the Associate Justices on the "Commission," who, four days before, exercised "the right to inquire into State elections for State electors," which he herein declares to be unconstitutional:

"The HON. GEORGE W. JONES:—

"WASHINGTON, Feb. 26, 1877.

"MY DEAR SIR: I do not believe that Congress has any constitutional right to inquire into State elections for State electors.

"Congress has of late years interfered quite too much with the States. The Electoral Commission has no more power than Congress has, and I think it would be a most dangerous usurpation were it to do what the States alone have a right to do, even to cure what I fear was a great wrong of the Louisiana Returning Board.

"I cannot doubt that such will be your opinion when you reflect to what the assertion of such a power would lead. It would place the right of the States respecting the choice of electors at the mercy of the federal government, and be the greatest stride ever made towards centralization.

"I am yours, very respectfully,

"W. STRONG."

If any one is privileged to decide as to who is elected in Oregon, and to appoint him accordingly, it is, by the specific law of the State, the Secretary of State and the Governor. But here is a case where both these State officials have carefully and positively declared the election and appointment of Cronin, which declaration the "Electoral Commission," with a prerogative which they could never lawfully enjoy, have decreed "was without authority, and is therefore void."*

They further declare Watts to be the truly appointed Elector and accept his vote, though the papers before them proved that he was declared, by the lawful canvassing officer of the State, in the certificate which he prepared and signed, to be not the appointee; and that he rested his claim to be deemed such an Elector only upon an impotent election, by the two other Electors, to a place which was not vacated, and in defiance of the authority of the Executive of the State. These two Electors thus make themselves the Executives of the State, in the stead of the lawful Governor, by refusing to recognize his commission, and the "Commission" uphold them in the crime.

On the other hand, in their decision of the South Carolina case, they laid down the broad, strong, unchangeable rule, that "the votes to be counted are those presented by the States, and, when ascertained and presented by the proper authorities of the States, they must be counted."

A summary of the results of our analysis of the Oregon case would run as follows:

1. Watts was in fact elected, or chosen.
2. Though eligible on December 6, he was not appointed.
3. Cronin was not elected, but he was in fact appointed.
4. That appointment was binding on the United States.

In reaching these conclusions, however, it must be observed that they hold good only at the Opening of the Votes in February, 1876. As herein stated, the Governor's appointment was a fraud on the State, and therefore her true representation was still in abeyance, and she might demand it of the United States. Had her courts decided that Watts should have been the appointee and had the State acquiesced, it would have been her right, as it is the right of Louisiana and Florida, to demand his recognition subsequently. Exception is taken, not to the result of the "Commission's" decision, but to their unlawful method of reaching it.

* Chapter iii., page 47.
8

CHAPTER V.

MEETING OF THE ELECTORS.

"Liberty is little else than a name where the Government is too feeble to withstand the enterprises of faction, to confine each member of society within the limits prescribed by the laws, and to maintain all in the secure and tranquil enjoyment of their rights."—GEORGE WASHINGTON.

PURITY AND INDEPENDENCE.

"THE electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves.

"And they shall make a list of all the persons voted for, and of the number of votes for each ; which list they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate.

"The Congress may determine the time of choosing the Electors, and the day on which they shall give their votes ; which day shall be the same throughout the United States.

"No person, except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office, who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States."

Of the foregoing clauses the first was changed by the XII. Amendment in 1804,* the sense of which is obtained by substituting for the words "two persons," the words "a President and Vice President."

It was done with the intent of solving the difficulty arising from the opening of an equal number of votes for two persons, the office being unnamed, which would throw the election into the House, as had occurred in 1801 with Jefferson and Burr.

* Appendix, "The Constitution of the United States."

It was designed that the appointment of Electors should be very carefully guarded, as we have seen, and the various ramparts which the Fathers erected around the Colleges, in their further prosecution of the business of electing a President, may now be reviewed.

The chief weakness of any system, which has for its object the selection of an executive armed with the power and patronage of the President, lies in the tendency to corruption, and that mainly from external influences. The Fathers knew this, and in endeavoring to prevent it, they were unusually sagacious and successful. Were our existing customs what the Constitution designed they should be, we should find almost every hope of the Framers realized. But we have departed from the faith, and sowing thus to the wind, may yet reap the whirlwind in bitter punishment for our sins against the spirit of our own organic law.

Hamilton presents, in the "Federalist," the view of the Electoral Colleges obtaining ninety years ago, wherein their purity and independence is set forth :

"But the Convention have guarded against all dangers of this sort (cabal, intrigue, and corruption) with the most provident and judicious attention. They have not made the appointment of the President to depend on any pre-existing bodies of men, who might be tampered with beforehand to prostitute their votes; . . . thus, without corrupting the body of the people, the immediate agents in the election will at least enter upon the task free from any sinister bias. Their transient existence and their detached situation, already taken notice of, afford a satisfactory prospect of their continuing so to the conclusion of it."

But evil has crept slyly into the carefully intrenched camp of the Electoral Colleges, as we shall see in discussing their defences, and this year it has surprised the nation by its unexpected mastery of the situation.

1. In the old Constitution of Maryland,* adopted in 1776, the electoral system for the selection of State Senators was in full operation for twelve years prior to the adoption of the Federal Constitution; whence, partly, it came that the scheme was so well understood by the States, and so cordially accepted in 1788. In that system the Electors were distinctly specified to be chosen "of the most wise, sensible, and

* Appendix, "Constitution of Maryland."

discreet of the people"; and, it may be added, it was required that the persons whom these Electors selected should be "men of the most wisdom, experience, and virtue." It is questionable if the Fathers were not just a shade too lax in omitting similar injunctions from the national System; though it is unquestionable that, on this great occasion of the quadrennial election, they relied for such selections on the patriotism and manifest interests of the States.

2. The provision that no Senator or Representative, or officer of the United States shall be appointed an Elector, is a most prudent guardianship of the purity and freedom of the election, as has already been set forth.* It has been shown that this extends to a prohibition upon the States, and as well to an ineligibility of the candidates. At the election of 1837 this rampart was scaled through the carelessness of Congress, and in 1877 it was violently overthrown by the Senate and the "Electoral Commission."[†]

3. The time of choosing the Electors, if Congress please to prescribe it, is required to be "the same throughout the United States." By act of January 23, 1845, that day is fixed to be "the Tuesday next after the first Monday in the month of November of the year in which they are chosen."

The spirit of this provision is the freedom of the electoral vote, which was partly to be gained by preventing such combinations among the partisans of the country, as that Electors might be chosen in the interest of some particular Presidential candidate; in other words, it was to prevent a pledge of the Elector to any candidate, that "sinister bias" which Hamilton so much deprecated.

Partisanship was the *bête noir* of the Framers, in their cogitations respecting the choice of a President, for they knew that it would then be cursed with intrigue and corruption; it is not too much to say, that it is the evil genius of the country to-day, and that all, and more than all, of the corruptions expected are swarming over the land in its wretched train. What the Fathers feared and fought against so strenuously, a political pledge of the candidate for Elector, is now one of the chief features in our electoral customs; it is the price of the candidate's nomination to the office, and, it is to be feared, often in exchange for a corrupt consideration. There is no doubt about the fact that this

* Chapter iii., page 68.

† Chapter iv., and Chapter xiii., "1837 and 1877."

custom of pledging the Electors is in flagrant violation of the Constitution, of its spirit, if not of the very letter. The law should forbid the infraction in unmistakable terms, as well as that concerning the interference of national officials.*

4. The Electors are to meet "in their respective States" for the purpose of casting their votes. The spirit of this provision is very clearly their purity and independence, and the object, to prevent combinations among themselves.

It was the fittest man in the country on whom the Fathers had their minds as the proper person for President, when they framed the electoral clauses, and not the man whose shrewd manipulations outgenerals the rest of the candidates. Being appointed and unpledged, it was designed that each College should meet separately, no College being in position to know how the others were voting; so afraid were they that these Electors might be tempted to combine on one candidate, and thus vitiate the very life of the System; so sure were they that it would open the way to corruption, and that a wide-spread corruption would eventually destroy the Republic.

Yet to-day this combination among the Electoral Colleges is the very boldest feature of our practice. It is the origin and end of our National Conventions, and therein the Presidential candidates are nominated, for whom the Electors are pledged to vote; and it is publicly asserted that, at the last one held, "barrels of money" were used in buying a nomination. The existing custom is clearly unconstitutional, and should be regulated by a general law.*

5. The day on which the electoral vote is to be cast is required to be "the same throughout the United States." By the Act of 1792,† it is set on "the first Wednesday in December." Here again the spirit of the provision is the independence and purity of the Colleges, by preventing a combination of the States on one candidate. It is obvious, that if one-half of the Electors, for example, were to cast their votes on one day, for two or more candidates, the rest of them, voting on a subsequent day, might readily concentrate on one person and elect him.

In the minds of the Fathers, an opportunity for anterior combina-

* *Vide* the plan proposed in Chapter xiv., "A New Law," sec. ii.

† Appendix, "Act of 1792."

and candidates.* In this case the State claimed a return, and desired the second to be received and open the principle involved is the same as if the former had and the latter the fraudulent return; as it might be tion, if the custom obtained. The Constitution has the spirit of the provision under consideration, that no such returns are lawful; they are as absolutely void in fact, as they are against the law; therefore they cannot receive consideration at the time of the election.

Votes.†

6. Another guard appears in the general spirit of the Constitution, which respects the time to be consumed in perfecting a President. Everything in the provisions points to a steady progression, from the appointment of the Electors until the arrival of the President-elect on the day prescribed by law. There is no looking back, no consideration, no contest anticipated; the appointment is at the State's supreme will, the election at the supreme will of the Electors, and nothing remains but to open and count the votes returned, agreeably to the Constitution. This is to prevent such a manipulation of the returns by any party, as would control an election.

It is palpable that if "double returns" may be conceded to one party honestly, they may just as readily be conceded to the other dishonestly; the door is thus left open for all sorts of corrupt practices, and that door the Fathers intended to close. It was this desire in the Convention, that one of the two

the Votes are to be opened and "then and there" counted, as the original phrase ran; "the person who may happen to have a majority of the whole number of votes will be the President," as Hamilton puts it, and if no one has a majority, the House are to elect a President "immediately," that is, "on the spot," as Pinckney explains. The substance of this provision the Houses have again and again deliberately violated, out of a higher regard for their detestable party lines than for the sacred spirit of the Constitution.

The Fathers, still in Congress in 1792, framed the chief law thus far executors of these clauses, and sought therein to carry out the spirit of the System by the days selected; there is no other explanation of the short intervening periods between the several steps in the business, and the tenor of their debates upon the subject demonstrates it. So that when such cases as that of Florida arise, wherein a State may have been misrepresented, it is due her that she have a fair representation, and Congress should devise an efficient and prompt means of providing it. But, for that the proceedings of the election must not stop, since her second claim may not be a good one in law, and the first duty involved is the establishment of an Executive without default. Therefore the Constitution has provided for no doubtful votes or doubtful Electors; those sent in are either Electors or not, votes or no votes, by plain description in the organic law; no contest is constitutional at the Opening, and Congress should make directory laws to that effect in specific terms.*

7. The next guard over the independence of the Colleges is found in their constitutional numbers, and its effect is to impress their acts with a due weight upon the country and the co-ordinate branch of the Government.

The fundamental business of all Governments, the control of the nation, divides into two principal branches, viz., making laws and executing them. In the nature of things these acts must be equal, and the law, which is the supreme will, must not be superior to its execution, which is the supreme power. In an absolute monarchy, the sovereign alone decrees and executes, and the equality of the two functions is fixed. The principle remains the same in all forms of government, for it depends on the very end of its being, adequate

* Vide the method proposed in Chapter xiv., "A New Law," sec. vi.

edifice, whose various features we have thus far reviewed. The Electors are to vote "by ballot." The ballot is usually interpreted as meaning "secrecy," but that is an error; it means "independence," which is gained by secrecy,—an honest and untrammeled vote.

This provision operates as a protection to the Electors personally, when their work is finished; that is to say, it was intended so to operate, though in practice it certainly does not. To-day, when the vote is cast, the detailed result is telegraphed at once the length and breadth of the land, so that the ballot has lost all its original value. Nevertheless, our modern Electors cling to this dead-letter of the law, and vote "by ballot" scrupulously, whilst, at the same moment, they are crushing the life out of the provision in numerous other ways. "For the letter killeth," says St. Paul, "but the spirit giveth life!" and we have seen this solemn truth illustrated at the last election.

There was a close vote for Electors on the 7th of November, 1876, and but one was required to give the majority to the Democracy, whom generally-alleged frauds had deprived of a number. The waves of popular feeling ran high, and rage and blood and anarchy were in the political air. At this crisis a savior was looked for to still the tumult—a Marcus Curtius to leap into the threatening gulf, and close it; but he was nowhere to be found. A supposed independent Elector was appealed to piteously to cast his vote in favor of the honestly-elected candidate, and save his country from impending revolution. But he was "pledged" in advance to the other party,—a party which he knew could win only by fraud, which he ought to have known was only using him to sustain that fraud,—and he sturdily answered, No! He clung to his party, from fear of political damnation, and was willing to see his country drift out into possible destruction. That act of party fealty raised up into full view the dead body of this provision, killed by "the letter" of the law.

In 1801, during the celebrated contest between Jefferson and Burr, when the nation trembled on the verge of ruin, and when the two parties stood unflinchingly face to face for seven days, in the House election, in solid phalanx beside their respective candidates,—a savior opportunely appeared. James A. Bayard changed his pledged vote, defeating his party, but saving his country. Does posterity condemn that act? A thousand times, No! It was a grand opportunity to

exalt his fame and to exhibit his patriotism, and Bayard had the courage and the virtue to seize it.*

It may be well at this point to sum up these features of the Electoral System, and note their relationship and bearing on the Colleges.

The central idea of the whole is the independence of the Colleges, and this end is sought by providing, 1st, for a selection of wise and honest Electors; 2d, for their freedom from the influence of the Government; 3d, for their exemption from political pledges and the parties; 4th, for the prevention of intriguing combinations among themselves; 5th, for their immunity from corrupt State influences; 6th, against injudicious delays and official interference with their votes; 7th, for co-ordinate power with Congress and supremacy over the nation; and 8th, for personal protection by the secrecy of the ballot.†

It is a most beautiful System, contemplated in the clear light of reason, and it ought to be better known to the people. They should draw it nearer to them by the lens of calm investigation, when it will be seen luminous with truth, encircling the bright star Independence, around which these eight provisions cluster like Saturn's eight satellites. The cause of their relative positions is the law of Representation, the great law of gravitation in this Republic, whose central sun is the Sovereignty of the People, and whose "Principia" is the Constitution of the United States.

* "One fearful crisis was passed in the choice of Mr. Jefferson over his competitor, Mr. Burr, in 1801, which threatened a dissolution of the Government, and put the issue on the tried patriotism of one or two individuals, who yielded from a sense of duty their preference of the candidate generally supported by their friends. Allusion is here especially made to the late Mr. Bayard, who held the vote of Delaware, and who, by his final vote in favor of Mr. Jefferson, decided the election."—Story's *Commentaries*, Sec. 1458.

"Unworthy will he be, and consecrated his name to infamy, who, having hitherto strenuously opposed the election of Mr. Jefferson, shall now meanly and inconsistently lend his aid to promote it."—Washington "*Federalist*," February 12, 1801.

† By the XIV. Amendment no civil officer of a State, or of the United States, who, having taken the oath of fealty to the Constitution, shall engage in rebellion or insurrection against, or aid the enemies of, the United States, shall be an Elector; "but Congress may, by a vote of two-thirds of each House, remove such disability."

BRIBERY AND CORRUPTION.

Guarded carefully as the purity of the Electoral College is, nevertheless fraud may creep into its transactions. No instance of the kind has ever transpired, for party fealty has the advantage of checking bribery to an extent. Nevertheless, as the Fathers foresaw, the effect of partisanship upon the Presidential election, let it have whatsoever other advantages it may, will ultimately demoralize the System; and we find the evidence of this growing demoralization painfully apparent in our recent election. In South Carolina, Florida, Louisiana, and Oregon were made unblushing offers to buy and sell electoral votes,—that is proven fully; how much money was offered, or accepted, to prevent a betrayal of party, does not yet transpire; the vote was close, the temptation great, and the morality of party politics was found to have fallen to a very low ebb.

It is a well-known principle of law that fraud vitiates the transaction tainted by it, and it is conceded that it may in various ways destroy the votes of an Electoral College. The means, etc., require no special discussion, and our further inquiry will only concern itself with the effect of a bribe.

Bribery is a crime involving two criminals, the Elector and the party bribing, destroying the honesty of the vote, and impairing the purity of the election.

The Elector is not, in the performance of his service, the agent of the State; therefore his guilt in the case cannot affect her interests. Her interests are the right to be represented in the Electoral College, unlimited by quality of good or bad, false or true, or any extent of morality or vice in the performance of the Elector's duty. But by destroying the representation, or lessening its numbers, her rights would be sensibly impaired. The Constitution permits the State freedom of appointment, and she may select a saint, or yet a villain, to represent her; the result is neither her gain nor loss in Electors or votes; and the appointees who represent her must be recognized.

The Elector is, however, an official of the United States, engaged in the transaction of national business, and the bribe at once destroys the quality of that transaction. The Constitution presupposes it to be the duty of all the officials under it to be honest, and dishonesty, in this, or in any case, is a crime against the nation. A crime against the nation

must be punished, and the people, that is, the Government in their stead, must punish the guilty Elector and the *particeps criminis* as well.*

The question then arises, Does an accepted bribe to vote for a candidate nullify the vote of the Elector?

The electoral votes perform three distinct functions, to wit: they indicate the State's quota, they express the Electors' choice, and they take part in electing a President. On this definition hinge many questions of a delicate nature as to their value and efficiency.

By the Constitution the Elector can choose whom he pleases for President, subject to the three limitations only, but there is neither an express nor implied limitation on the motive of his choice. That may be single or multifarious, honest or dishonest, weak or strong, partisan or patriotic; it is nevertheless an impalpable mental action, and must be independent of law in the very nature of the case. But it is only the motive which can be affected by a bribe. The law directs the guilty Elector to choose; it is an act to be done, and he does it; therein he fulfils the law. Were the bribe to affect the act of choosing, it must be by retarding or stopping it; to change its direction, is not to interfere with it as an act to be done; upon whomsoever the choice alights, it is still a choice. So that the bribe, the interference with the motive of the choice, is not an interference with the choice itself, and therefore cannot be taken cognizance of as affecting that choice.

Then again, the Elector's vote is simply an expression of his choice; it is not a thing to be done absolutely, but the means by which the thing to be done, a choice, is to be exhibited. And, the choice being unimpaired by a bribe, the vote is accordingly valid.

And, finally, the State is entitled to the counting of the vote, not because it is an honest vote, but solely because it is a vote; it represents her in the business of electing, which is her right; whilst it is not within the power of the nation to defeat that right, on the ground of fraud nor on any other ground, except only when the State has appointed national officers.

It is obvious that an Elector may not cast a vote for President; it has happened frequently, and particularly in the earliest elections; yet no regulative cognizance can be taken of it at the Opening of the Votes. The State was entitled to a representation, but did not have it, and

* *Vide "A New Law," sec. ii., in Chapter xiv.*

there the question of privilege falls, the responsibility resting with him. Now, suppose that the Elector was bribed not to vote, and for that cause did not vote; the legal situation is not changed by force of a knowledge of the motive of his non-action; there is still the same default of State representation, which cannot be taken account of by the United States.

Let us suppose that the Elector is bribed to permit an unauthorized person to vote for him. Here the situation is unchanged as respects the State, whose lawful Elector fails to vote; but as respects the United States it is manifestly changed, and we have the act of choosing performed in an unlawful manner, that is, by an unauthorized and impotent person. The result is no competent choice, and therefore the vote representing it is null and void. But it is void, not because the bribe was taken, but because an impotent party cast it.

It may indeed happen that the single vote of the bribed Elector elects the President; is he fully elected in that event? As explained, the Constitution does not design a scrutiny of the Elector's motive, it only requires his vote. A vote cast by a legally-appointed Elector is therefore valid in fact and law, and a valid vote must have its full weight in determining the President.

As to a right of subsequent review, it would seem to be foreclosed. The State might claim the right to have the vote set aside, for example, on the ground of a false representation. But it is not either a false or a true representation by votes which the Constitution provides for, but simply a representation in fact by her legally-appointed Electors, and that the State has received. Further, she could not claim the representation false, in the sense that it chose one President and when it should have selected another; for she has no authority to dictate the person to be chosen, and therefore cannot be represented falsely in this wise. It is probable that a President, seated there by a single purchased vote, might destroy the peace of mind of the opposite political party; but such an organization is unknown to the Constitution, and its discomfiture of no legal moment.

It is manifest that the Elector can make no claim to a subsequent change; for with the casting and transmitting of the vote his office expires.

The United States cannot claim a change in it, because their duty in the premises is solely to count the votes. It would be impossible

for them to reject it, since that would defeat the right of the State ; it is not possible for them to require the Elector to change it, for he is *functus officio* ; and to change it themselves or have the State change it, is to exercise an unconstitutional power. So that once cast, bad as it is, it must stand perpetually.

It may even be the case that more than half of the people of the United States have fairly elected a given candidate, and that this majority has also a majority of the Electors ; but that it is only a majority of one, and that one has accepted a bribe and cast his ballot for the candidate defeated by the people. Nevertheless it must stand. For the Constitution does not contemplate that the people shall vote directly for a candidate, and its whole spirit absolutely prohibits it.*

The existing custom of voting for Electors pledged to a certain candidate, which is practically a popular election of President, is another instance of killing a law by obeying its letter and disobeying its spirit.†

But there is one way in which such a President might be reached, and that is by tracing the bribe to his hands. The vote is not guilty and cannot be punished, but the candidate who bought it may be. The Constitution is specific upon this point, and the vengeance of an outraged people should be swift, sure, and terrible.

The person who would step up into that exalted seat only by descending into the foul depths of bribery is unfit to occupy it ; he has stabbed the virtue of the nation, not like a man, honestly and to its face, but, like a contemptible assassin, in the back ; and he should meet the scorn and contumely of every citizen of the land. Another Judas Iscariot might betray his master for a pittance of silver, and another Benedict Arnold might sell his country for bags of gold ; but this man would be more contemptible than they both ; they would sell their good name for gold, while he would buy his own infamy,—for the sake of drawing over his dishonored breast the nation's honored robe of state. For all time it should be said of him,—

“He was the man,
Who stole the livery of the court of Heaven
To serve the Devil in.”

* Chapter iii., page 41.

† Chapter xi., “Election of President by Congress.”

POWERS AND DUTIES.

The business of the Electors being the choice of a President in the stead of the States and people, they are invested with a plenary power of choice. Choosing is their function, and their power extends to nothing more. Herein they differ from all other official bodies, but herein they are co-ordinate with Congress in supremacy, and their choice is law to the nation. In the language of the Constitution, "the person having the greatest number of (their) votes shall be President." It is mandatory, and all persons, all considerations bow down to it,—except justice; that is always regnant, and a President seated in the executive chair by proven fraud is a blot on the escutcheon of the United States.

Their power of choice necessarily divides into two branches, selection and election,—the formal acts of choosing and voting. In this, of course, they are the agents of no one, neither the State, the nation, nor the people; that is to say, they are not appointed to execute the behests of any constitutional authority. Their responsibility begins and ends with their own consciences, and in the exercise of their duties they are amenable to no law.

By the Constitution the choice by the Electors is limited in only three directions, which exceptions make their authority more absolute in all others.

Firstly, one at least of the persons for whom they vote shall not be an inhabitant of the State wherein the Electors live. The provision was intended to prevent fraud possibly, or it was a policy which the Fathers thought advisable; but it has an object which is not very clear to-day, and therefore, it may be presumed, is religiously adhered to.

Why, for example, both a President and Vice President may not be taken from New York is not quite obvious. The fact is that candidates from New York ran for both offices in 1876, though on different tickets; there was no political significance in it however, nor would any be clear if they had been on the same ticket. In case of a failure to elect at the Opening of the Votes in 1877, the President would have been elected by the Democratic House and the Vice President by the Republican Senate, and we should thus have had Tilden and Wheeler from the State of New York, without violence done to any principle or policy which is apparent.

It might have been devised to prevent one section of the country combining against the other; but any two adjoining States, by agreement, might accomplish the same result, and yet obey the letter of the law.

Secondly, their votes must be cast on the day appointed by law. The principle underlying this has been adverted to, and, since it executes a principle, the provision must be carried out. The Constitution is clear, and it is the duty of the Electors to obey it. If therefore they fail to vote on the appointed day, they are in the position of any other voter who fails to attend the poll at the proper time,—the vote is lost. They have no right to cast it on a subsequent day; and, if they do, it is null and void and must be rejected at the Opening of the Votes, as must be rejected any other unwarranted and illegal return.

In 1857 the Wisconsin Electors failed to vote on the appointed day,* but on the next day met and cast their votes, and sent them to the President of the Senate, with the explanation that a violent snow-storm had prevented their meeting according to law, and, being "the act of God," it should not be held to nullify them. At the Opening of the Votes the President of the Senate refused to entertain the objection made to them, and they were counted,—of course wrongfully.

"The act of God" may be a valid excuse in many cases, but it certainly ought not to operate as a legal release from the consequences of one's own neglect. That Wisconsin permitted her Electors, on the solemn occasion of a Presidential election, which she should have recognized as a privilege to be carefully cherished, to risk her vote to the last minute, so to speak, by so careless an assemblage as that twelve hours only separated the Electors,—is a good cause why she should lose it; and there is no propriety in charging it to the account of God. The loss of representation on a few such occasions would prevent future carelessness, and perhaps teach the States and the people somewhat more of the value of the privilege. The shortest method of making a severe law harmless is to execute it.

Further, such a custom, established, would invite and inevitably lead to numerous frauds, and to prevent them the Constitution must be executed *de rigore*.

Thirdly, in choosing a President, the Electors must vote for "a

* Appendix, "Annals of Congress," 1857.

natural-born citizen," at least "thirty-five" years of age. This is mandatory also, and like the foregoing, they must obey it; if they do not, the ballots so cast are not votes, and, being void, must be rejected. The first provision is evidently intended to fan the flame of native ambition and patriotism, and the breeze became a gale in later years as the "Know-nothing party," which advocated the exclusive limitation of this franchise to native-born citizens. The second provision is instituted, like such limitations usually are, on the ground that it is an average fair number of years, and because the Presidency should be limited to candidates of some definite age.

By the XII. Amendment the eligibility of the Vice President is made the same as that of the President.

OFFICIAL RELATIONSHIP.

The question has been raised, as to what is the official relationship of the Electors, and it may here be appropriately examined.

They are, firstly, the representatives of the States, precisely as are Senators and Representatives, and must be recognized by the United States as such. In that capacity their amenability to the State extends to all the incidents of appointment; that is, the State is supreme in declaring who is or is not an Elector, up to the time of voting, and when that is reached her authority in the matter is ended.* No Senator is a representative of the State in the sense of being appointed to execute his State's political behests, nor is an Elector; they both represent her, but it is in the transaction of national affairs.

Secondly, in the execution of their right of choosing a President the Electors are amenable to no superior, as has been shown, and hence have no official relationship. When they vote, the State is represented and a President elected; when they do not vote, the State is unrepresented and a President is not elected.

Thirdly, the election of a President is an affair of state, and, when the Electors engage in it, they become officials of the United States, executing the Constitution in this particular.† In this relationship they are not "officers," such as those who are forbidden to be Electors,

* Chapter iii., page 62.

† Chapter xi., "Amendment and Acceptance."

nor those requiring appointment at the hands of the President. But they are like Congress, a national body, and co-ordinate in every respect with Congress. In this capacity they are subject to the organic law and to the laws of Congress made in pursuance of it, as Congress themselves are. No statute can touch their power, nor change the spirit or the letter of the constitutional provisions prescribing it.

Being a constitutional body, their acts must be recognized, not with the view of trying and judging, but of enforcing them.* Their actions are represented by their votes, which are to be opened "agreeably to the Constitution" and counted, and the President whom they have elected duly declared.

THE ELECTORAL COLLEGE.

A question, growing out of the recent Oregon case,† and extensively discussed at that time, concerns the Electoral "College," and may be touched upon here. It was asked, What is a lawful college? and how must it be lawfully organized?

The term, "college," is a convenient one to apply to the "meeting" of the Electors, but is in no wise a constitutional designation. It has the flavor of an organization, in so far as to mislead the popular mind, and in so much that "the offence is rank and smells to heaven." For there is no suggestion of an organization in either the organic law or the law of 1792, though doubtless the Electors, particularly in the larger States, do often organize. Nor is there any impropriety in an organization, in fact it would be advantageous, if effected under a judicious law. But to leave it entirely in the hands of the Electors, subject only to their government, and at the mercy of a number of partisans of varying political predilections, as may sometime occur, would be a blunder.

At present no organization is required, and none is essential to the correct performance of their duties. The Electors may make one list, or as many as their number, provided they make them agreeably to law; and, at the Opening of the Votes, each lawful list must be duly recognized. The objective purpose of both the Constitution and law is simply to provide a means of procuring the lawful vote of the

* Chapter iv., page 93.

† Chapter iv., page 107.

State; and therefore, so long as that appears, it is immaterial in what shape it presents itself.

Under existing customs, the Electors represent the majority vote of the State, and not of the districts in the State as they undoubtedly should. That was the ancient practice, and, if the people can ever be persuaded to recognize their manifest interests, it will be instituted again. Under these circumstances, organization would invite discord and dissension, dangerous to the consummation of their duty, and it should therefore be provided for by an efficacious law.*

The votes being cast, the remaining duties of the Electors are of a strictly clerical nature.

They must "make a list" (three lists, by the Act of 1792) of the persons voted for, the offices they are to fill, and the number of votes cast for each. This is simply in order that the votes may be brought together at one place and opened by the President of the Senate as the national agent, in order to see that they execute the Constitution.†

The list being duly made out, the Electors must "certify it," as their act and deed, and "sign" it. Not being the original votes, but only a "list" of them, it is incumbent on them to make such a certificate as will guarantee their correctness; and this is a less objectionable way than transmitting the ballots, which might be surreptitiously changed.

These certified lists are the links that connect the States and the United States—the States in their right of representation at the election, and the United States in ascertaining and declaring the President. Being such important documents it was proposed in the Constitutional Convention that they should be transmitted "under seal of the States," but the proposition was overruled on the ground, most probably, that such a regulation was within the legitimate province of Congress.

In their enactment of laws executory of this provision, one of the most important points to guard was the identification of the Electors certifying the lists as the Electors appointed by the State; and this, we have seen, was provided by the law of 1792, in conformity with the Constitution, to be done by the Governor's certificate.‡

* Chapter xiv., "Electors and Elections," and "A New Law," sec. iii.

† Chapter iv., page 95.

‡ Chapter iii., page 54.

The next duty of the Electors is to "seal" the certified lists, so that they may be secure from either prying into, or tampering with. Such a regulation is obviously wise, for the interests at stake are large, and the Harpies of politics will be flying about at such times, ready to defile the purity of any return they can reach. The duty is of little importance now, under our changed customs of electing a President, and therefore it is religiously adhered to; and the farcical spectacle was witnessed, at the recent opening, of the solemn presentation of a "strong box" to the President of the Senate, who soberly took therefrom and gravely broke the seals of the certified lists, thus prepared and kept that they might be pure and good, but filled to overflowing with iniquity and fraud.

The lists being sealed, the law of 1792* directs that "the Electors shall certify upon each that a list of all the votes of such State given for President, and of all the votes given for Vice President, is contained therein."

Their concluding duty is to "direct" the lists to the President of the Senate, and "transmit" two of them to the seat of government, one by post and one by messenger, and to deposit a third with the United States Judges of their respective districts, according to provision of the above Act.

Then the Electors are *functus officio*. Hamilton, in the "Federalist," refers to their "transient existence," and Judge Story speaks of the "sole and temporary purpose" of their appointment. There is no question indeed, from the constitutional provision creating them, that the transmission of the certificate is the termination of the Electoral College.

* Appendix, "Act of 1792."

CHAPTER VI.

RECEIVING THE LISTS.

"One method of assault [upon the principles of the government] may be to effect, in the forms of the Constitution, alterations which will impair the energy of the system, and thus to undermine what cannot be directly overthrown."—
GEORGE WASHINGTON.

AN OFFICIAL AGENT NECESSARY.

WHEN the votes of the Electors have been duly cast, listed, signed, and certified, the Constitution has enjoined that the Electors "shall transmit them, sealed, to the seat of government of the United States, directed to the President of the Senate."

In this injunction there is much greater force, a more exact and well-considered design, than is usually accorded it. In the earlier proceedings under the Constitution, as the record shows, much consideration was given to it, although no such questions arose, as that its legal definition required specific explanation and adjustment. Actual complications arising under it did not transpire until 1865, and in the mean time the opinion of the nation's statesmen had drifted away so far from many of the true purposes of the constitutional provisions, that, in their immediate settlement, the principle involved was overlooked.

In a general analysis of the Electoral System, however, it must have its force duly estimated; and it will then appear that it disposes finally of a bone of contention, which has vexed the land for the space of at least sixty years.

The "sealing" of the certified lists, as has been shown, forbids inspection; so that there is now no constitutional means of knowing their contents, until they have reached their "opening" before the House and Senate.

The command, that they be transmitted "to the seat of government

of the United States," imports their official nature as documents belonging to the nation; they are no longer representative of electoral discretion and power of choice, but are evidences to the nation of the persons upon whom that choice has fallen; they are more than the simple lists of the ballots cast, being the authenticated votes which elect the nation's next Chief Magistrate.* The intrinsic value of the List is therefore as great as the extent and eminence of the United States, and it is endowed with all the sanctity, vested with all the potency and accompanied by all the authority, which such a nation can impart to such a document.

It is evidently intended, the Electors being now legally defunct, that these lists go into the post, that is, into the immediate keeping of the nation, out of the hands of its late officials. Such an intent would be accordant with the nature and importance of the documents; but, being a policy which might subsequently require modification, the direction is only here implied. In legislating upon this point in 1792, the Fathers particularized the post; and also instructed the Electors to employ a messenger who should be a national agent, to deliver a duplicate list, affixing a penalty to any violation of his trust.† Thus the United States very properly become the custodian of the electoral lists, until such period as they are delivered to the constitutionally-appointed agent, in which trust they are invested with no authority but the single one of guardianship. Whereby the Constitution carefully executes its prime design of forbidding all control over the electoral returns by the national authorities.

At this point it is clear that the Constitution itself must designate some one as an official agent, who shall have authority to "receive" these lists. It would have been the height of unwise to leave so important an agency to future legislation; for thereby political influences would most probably control the selection, which was unpermissible; or, the Government might assume a proscribed control, for evil purposes; or, at the best, an instability would attach to the execution of a System, which was designed from the outset to be definite and unalterable. For reasons best known to the Fathers, they selected the President of the Senate, and the Constitution designates him conclusively.

* Chapter iv., page 91.

† Appendix, "Act of 1792."

In the national post-office, "directed to the President of the Senate," no one can come into possession of the lists but that official. In 1792 the law directed the messenger to deliver the duplicate to the President of the Senate; and the more securely to guard it, it was to be deposited within the national archives, in the event of that official's absence, thence to be transferred into his hands alone.

There is much significance in this cautious disposition of the lists,—more than the single design of preventing inspection of or interference with them. These two ends are attained by sealing and posting them, as shown; but here is a special sequestration into the hands of an individual, and the obvious deduction is, that a personal responsibility attaches to the trust. The President of the Senate was then to be, not only the official representative of the nation in the transaction, but individually responsible for its lawful execution. Why, will duly appear, when we have analyzed the duties which the trust involves.

A CONGRESSIONAL AGENT PROSCRIBED.

By this individual responsibility one fact is fixed, namely, that it is not as an officer, or representative of, the Senate, that the trust falls on him; and the fact is clear also from other considerations. It is a national service which he is to undertake, and he so far is exalted above the subordinate position of a presiding officer. It has been demonstrated also that the Electoral System demands the exclusion of the Senate from such control; and to have made one of their own members, subject to their daily authority, simply the custodian of the lists, would have been to place them in the immediate charge of the Senate. But again, by force of what reason may the Senate claim special oversight of them? They are but one branch of the Legislature, and the House is a co-ordinate body; for the Senate therefore to claim this privilege is to prejudice the interests of their equals, which the electoral clauses in their further enactments have purposely avoided. And finally, the President of the Senate was presently to act as agent of the nation in "opening the certificates in the presence of the Senate and the House" as witnesses. So that it must be held, on these considerations, that the deputation of that officer as the Receiver of the Votes is in no wise intended to confer authority on either branch of Congress to supervise their reception.

Conversely, this fact argues again to the magnitude and importance

of the trust, which has already been foreshadowed, and prepares us to discover in it something more than a protective guardianship. It is not reasonable to hold that such a commission, hedged about with these precautionary provisions, should be after all only the clerical duty of depositing them in, and subsequently taking them from, "a strong box," which our modern Solons in that office have determined it to be.*

SELECTION OF THE VICE PRESIDENT.

Conceding the accrument of a political trust of some delicacy and importance, from the execution of which both the members of Congress and the officers of the Government were inhibited, and which yet required the interposition of some agent of the nation, who, in all the range of their officials, was so exalted, so independent, and so competent to perform it honestly, as the Vice President of the United States? His official position and relationships were to be unique, and, under the original theory of the Electoral System, freed from the complications attending other officials.† He might be expected to be the most eminent man in the land, certainly not less than the second, and trusted and admired by the majority of the people. He was in the Government, and yet not of it; attached to the executive branch, he had no executive authority; his power was to begin only when he was no longer a Vice President, and even then this special trust was to be fulfilled when the term of his incumbency was almost ended. Belonging to neither the judicial, legislative, nor executive branches, he was pre-eminently unfettered by political bias, and removed from political influence.

There was, to be sure, the possibility that he might be one of the candidates included in the lists; but that could at worst be only one objection, which many others far outweighed. Further, such an objection would attach to any man in this Republic, where all may freely aspire to its highest offices, who might have been preferred. And, finally, as an officer of the United States, deputized to transact national business, he was subject to the legislative authority of a jealous Congress, who might prescribe the regulations necessary to insure its faithful execution.

* Appendix, "Annals of Congress," 1877.

† Chapter xi., "The Electoral System Presented."

Generally, he would be only the presiding officer of the Senate, without even a voice in their proceedings, except in extraordinary cases ; and yet, as the presiding officer of a body which was peculiarly representative of the States, he would appropriately and independently personify its character as the Receiver of the Electoral Lists of the States.

Only in the event of the Vice President's death or disability would the trust fall on the President of the Senate *pro tempore*, who, in such a case, is *ex-officio* the Vice President, and must be obedient to the statutes of the nation, as his predecessor would have been. Such a contingency, however, might happen any time, and it was therefore necessary to anticipate it by limiting the office to the President of the Senate, who might always be *in esse*.

So that, the more minute becomes the analysis of his personal and political surroundings, as they were designed to be under a genuine and pure Electoral System, the more clearly is the sagacity of the Fathers exhibited in his selection. Some such reasons must have directed their choice then, as they certainly confirm its wisdom now.

" RECEIVING " IS A TRUST.

By the letter of the Constitution two duties are imposed upon the President of the Senate in this connection, viz., "to receive the lists and to open the certificates." All the trust confided, the faithfulness exacted, and the responsibility involved, must therefore centre in these two acts.

Is it reasonable then that they consist in the execution of the minor duties of accepting the charge of lists, which are already in charge of the post and of the Secretary of State, and subsequently breaking their seals ? Does all this caution, this exactness, this significant choice of an official agent, culminate in so subordinate an act ? Any clerk in the employ of the Government could perform such duties as well as the Vice President ; and why look so high, when the business is so trifling as it is held to be to-day ? The fact is present, that the Constitution has selected from all the nation one official to be its agent here, and the remarkable fitness of that official for the execution of the highest trust has been made apparent. May we then ignore all these signs and omens of high emprise, and betray the wisdom of the Fathers by an ascription of their care and foresight to overweening folly ? Rather let

us, recognizing their transcendent capabilities, endeavor now to know what they originally designed and practiced, and what our immediate predecessors have misunderstood.

By the text we only learn, that the lists of the votes are to be directed to the President of the Senate; but constructively he must be held to be charged with the business of their reception, and, it has been seen, that the law of 1792 recognizes this by providing for their deliverance to him in person.

By a resolution of the Federal Convention,* framed concurrently with the Constitution and which was a part of that instrument originally, the duty of the President of the Senate in the premises is particularized as "Receiving the votes." This resolution is of equal authority with the Constitution, and it explains definitely what the duty of the agent is. Further, in the transactions of the 1st Congress under the Constitution, his duty here is again denominated "receiving the votes."† So that there remains no question of the trust incumbent on him, but only as to the import of that trust.

"Receiving the votes" evidently includes the whole duty down to the time of "opening" them. No date is set for it, and it therefore may be postponed until the day and time of Opening, if expediency direct; though it is as reasonable that, if earlier received, the votes must be retained with that scrupulous precaution hitherto observed. But the fact is evoked, that the particular office, duty, or trust, the high political business undertaken, is to "receive," and only to receive, the votes. There must be great importance attached to the faithful performance of the duty!

What are to be received? The Electoral Lists, containing the votes for President and Vice President.‡ How are they to be known? In their present shape, they are securely sealed from observation of their nature, and directed to the agent of the nation. They issue from the Electoral Colleges, which are the instrumentalities by which the States participate in the election, and they therefore represent the wishes of the States. Wherefore they must, by some indorsement, indicate the States from which they come; this was specially directed in the law

* Appendix, "Resolution of 1787."

† Appendix, "Annals of Congress," 1789.

‡ Chapter v., page 128.

of 1792, and it is all that such indorsement may communicate.* It is thus apparent that the duty of the President of the Senate is to receive the votes "of the States." Here is matter of the greatest political importance, and we at once begin to recognize the character of the trust confided to him.

TECHNICAL AND LEGAL MEANING.

In the Convention's resolution just recited, the duty of the President of the Senate is affirmed to be "receiving" the votes of the Electors. On the first occasion of its execution in 1789, the returns were already, by special direction of that resolution, in the possession of the Secretary of the United States, and it would seem that, if but a minor duty attaches to the word, it would have been omitted altogether, and that the general order would have run in such wise as this: The lists shall be signed, sealed, and directed to the Secretary of the United States in Congress assembled; and the Senators and Representatives shall appoint a President of the Senate for the purpose of opening and counting the votes. Instead of which the Resolution prescribes "receiving," as his first and particular duty, and with full knowledge of the fact that the word is not used in the electoral clauses. Whilst thus defining more clearly the duty of the agent, the Fathers also disclose their own comprehension of its tenor; and they show that it was a function of much weight and significance, with which they intended to invest him. This will appear more fully when we have considered the equally important trust of "opening," which was simultaneously conveyed.

Drawn up by capable statesmen, as the Constitution was, we must then regard this word as employed in a technical sense, and as importing a trust of a grade suited to the exalted officer and occasion with which it is connected. In its most usual sense and natural meaning, Receiving imports something more than merely "taking"; and its definition includes the idea of "acceptance," or "voluntary taking." From a careful examination of the best authorities, it is indeed almost certain that it always has this significance; and we thus ascertain its meaning in the text to be, officially "accepting the electoral votes."

Furthermore, since we are dealing with a carefully-considered, legal

* Chapter xii., "The Act of 1792."

instrument, we must give a legal force to its words and phrases. "Receiving" is a frequently-used and well-understood legal term, and has a specific interpretation in the courts, if not clearly shown to be employed in some different and unusual sense. Its legal definition is, "The voluntary taking from another what is offered," wherein the possibility of "rejection" is obviously included. Thus, guilt attaches to the receiving of stolen goods only because the receiver has taken them voluntarily, and might have rejected them. The receiver of the electoral votes takes them not only voluntarily but officially.

And, again, there is a trust conveyed, and Receiving must, for this good cause alone, import a power of judgment and discrimination, in taking the State returns. An official who is empowered in general language "to receive," is also empowered to discriminate and to "not receive" in certain cases. The idea is made clearer, when the technical sense of acceptance is substituted, which involves discrimination,—that judicious execution of official duty which alone fulfils the spirit of the trust confided.

We thus perceive the full purpose of the Fathers, to wit, to invest the agent of the nation with the power of officially accepting or rejecting the certified lists transmitted to him, and purporting to issue from the States.

Here, then, is a trust of such importance that it may be abused; which argues nothing against its devolution, for the possibility of abuse attaches to every grant or privilege of power; only the duties prescribed by the Constitution are likely to be free from over-anxiety to perform or disposition to enlarge them.

It is now clear why the Fathers did not select a subordinate officer, under the control of the President or of Congress, to "receive" those returns; the same reasons guided their choice here, which had divested Congress of the right to elect a President in the first instance, and had vested it in an independent body of Electors; it was to guard the lists from any interference by the Government and Congress, and so protect them from the machinations of party politics.

Having thrown every safeguard, which their united wisdom could devise, around the purity and independence of the Electoral Colleges, it became their duty still more carefully to protect that purity and independence after the votes had gone into the hands of the United States. Therefore they chose the Vice President to execute the trust,

and we have seen that, in the entire range of national officers, he is best adapted to execute it honestly and justly.

Such a trust, so given, imposes the duty of accepting it, as well as that of executing it; it is too high, too delicate a function to submit to less capable hands, if that may possibly be prevented. Whence we can understand the pure motive of duty which prompted such high-minded, disinterested men as John Adams, for example, to "receive," as Presidents of the Senate, the votes which made them Presidents of the United States.*

LEGISLATION REQUIRED.

But the Fathers did not stop at trusting the faithful execution of this function to the honor of the future incumbents of the office; upon certain occasions that might be too weak a tenure by which to maintain its purity and independence. Therefore they conveyed the trust in the most general language, which, by well-settled decisions of the courts, is to be supplemented by the necessary legislation.

In the first "electoral period,"† Congress passed efficient laws to meet the known wants and circumstances of that day, and the Act of 1792 specifically provides for this duty.‡ How little is comprehended of that statute under which the returns have been prepared ever since!

By the Constitution, the lists are to be "sealed and directed to the President of the Senate"; by the law the Electors are required to "certify on each that a list of the votes of such State is contained therein." Why this additional indorsement? In no possible way can the direction be accounted for, except as the means by which the President of the Senate may officially "receive" them; all other explanations are futile, and make the law an absurdity.

This indorsement is not a simple writing;—it is a certificate signed by the Electors, and the proper and appointed evidence of what is contained in the packet. Electors are national officers, and the President of the Senate, representing the United States, is in duty bound to take official cognizance of their appointment, as he is to recognize their certified lists. Knowing then what Electors any given State has appointed, and being presented with a list certified by these

* *Vide* the Vermont case, Chapter xiii., "1797."

† Chapter i., page 17. ‡ Chapter xii., "The Act of 1792."

same persons, he recognizes it as the *prima facie* State return, and accepts it accordingly. If it be indorsed by other persons, he rejects it as not being the return of the State. If it have no indorsement whatever, it must be opened and examined in order to ascertain the names of the Electors, and if they are those of the State the certificate is good; for no law but the organic law can vitiate a State's votes, or deprive her of representation. The provision of the Act of 1792 was devised to enable the President of the Senate to execute his duty of official reception more conveniently, but may not be held to impose any restriction on the States or the Electors, not authorized by the Constitution.

During the second period, 1821 to 1861, questions arose pertaining to the question of what constituted a "State," which were compromiseingly relegated to the regulation of futurity.* In the third period, as we have seen, Congress had usurped the domination of those matters, and refused specifically to make any just and general law, in 1865, for example, preferring to adjust them *ex cathedra* when presented and as partisan policy might dictate.

Throughout the Annals of Congress there appears no reference, in any discussion of this matter, to the specific authority granted to Congress, of requiring and prescribing the legal evidence of the transactions of a State in a Presidential election. The Framers of the Constitution evidently understood it, and thereunder prescribed a certification by the Governor of a State to the appointment of the Electors. Other questions have, however, since arisen, and other rules are requisite under our new political methods, which Congress are in duty bound to exact. Art. IV., Sec. I., of the Constitution provides as follows:

"Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

This provision covers the case in point. It is the States which elect a President, and it is they alone who are entitled to inquire into the electoral appointment of any particular State, as it is they whom the President of the Senate represents in accepting and rejecting electoral lists. Congress then have ample power to prescribe the authentications of all State appointments, and to determine what effect they

* Chapter iii., page 39.

shall have at the Opening of the Votes; in which prescription they are limited to the employment of "a general law," and absolutely prohibited from special judgments, such as that which rejected the returns of Louisiana in 1873.

A statesmanlike regard for the interests of the nation, a decent respect to the provisions of the Constitution, demand therefore that an act be framed to regulate its future execution. "Electoral Commissions," and all such bastard progeny of political fraud and faction, are conceived in lustful disregard of the fundamental law; illegitimately brought forth, they are fitly framed for endless deeds of injury and injustice. The desire of the Fathers, the demand of the Constitution, and the necessities of the national peace, all unite in requiring a clear, specific Statute, by which the official reception of electoral lists may be regulated; and that, in the hands of the President of the Senate, as the ministerial agent he was designed to be, would be the standard by which to measure them when presented, and to accept or reject them as the rule ascertained them to be valid or invalid.*

When in session, the President of the Senate regulates the affairs of that body by the rules prescribed, and with efficiency and satisfaction; in which case he is neither more nor less than the Senate's agent, to receive or reject their motions and proceedings as their own laws have provided. As the agent of the nation, his functions would be the same; that is, to accept or to reject the electoral returns by the standard rule prepared for him. In performing that office no political affiliation, no partisan prejudices or personal designs, and no ignorance or fraud could intervene to prevent the administration of justice.

One man, therefore, armed with such a law, is better, more efficient, honester, than all the Congress, or any fifteen of the most judiciously selected committee-men, declaring by party majority what President the nation shall or shall not have. The Fathers would have fallen from the high esteem in which we hold them for their wisdom and sagacity, had they made any other disposition of so important a trust than to the Vice President of the United States. The recent Congressional mismanagement of it is a lesson, which the people of the country should profit by.

In the execution of such a trust a personal responsibility and integ-

* *Vide "A New Law," sec. v., Chapter xiv.*

rity are essential; in such and so numerous a body as the American Congress, responsibility is soon lost, and oftentimes collective integrity very hard to find. Swayed, as they usually are, by political policy, it is natural that the party majorities should regulate their duties by the advantage to be gained; and then there must be an end of the purity of our Presidential elections.

No body of constitution-builders ever knew human nature better than did the Fathers of this Republic, for their wisdom was obtained by fifteen years' experience of its worst political types. From the stirring scenes preceding the Declaration of Independence, through the toryisms, treasons, and disasters of a bloody war, they had fought their way, step by step, to victory and peace; and they had now been wading for ten long years through the slough of jealousy, intrigue, and corruption, whereon the base of their confederation had been laid, and into whose depths it was slowly sinking out of sight. In their "new and better union" the happiness, prosperity, and peace of this nation was built up carefully block by block, and the purity of the Presidential election was the very keystone of the arch. The whole structure depends upon the virtue and intelligence of the people; if that remains, then the displacement of that keystone will not be permitted, and an honestly-elected President will remain for ages, the crowning glory of our System.

DUTY INVOLVED IN " RECEIVING."

Since the trust of Receiving includes the discrimination necessary in accepting or rejecting, the duties therein involved may be indicated.

They converge upon one issue only, which arises from the indorsements upon the lists. They either contain the names of the Electors and of the State whence they proceed, and so advise the President of the Senate, or the messenger, who bears the duplicate, must lay the facts before him. Does the alleged return come from a "State"? is the first question to be solved.

As has been set forth, only a State is privileged to be thus represented, or to exercise the power of appointing Electors.* Therefore the word "State" should have an express definition by act of Congress. To waive the enactment of such a defining law, is to subject the trust

* Chapter iii., page 39.

to possible error or fraud, which is inconsistent with the design of the System ; the duty of thus legislating, which has so long been neglected, is the precise duty for which a Legislature was ordained.*

In the absence of such a law, the President of the Senate must himself interpret the Constitution, and decide the question of Reception. As the agent of the nation, in this instance he is the United States, presumably clothed with all their knowledge and ubiquity, and capable of ascertaining what are and what are not the States composing this Union.† In the execution of his trust, he must determine the facts and apply them as the standard of the official value of the lists.

This is no unusual or pre-eminent authority, but attaches to every high officer of the nation, and to Congress in framing laws executory of the Constitution ; the United States courts are the last resort to which a State may appeal in maintenance of her rights, if rejected.‡

In referring to the Constitution as a grant of limited powers, and to the execution of those powers by the officers of the United States, Justice Story lays down the following rule :

" Whenever, therefore, they are required to act in a case, not yet settled by any proper authority, these functionaries must, in the first instance, decide, each for himself, whether, consistently with the Constitution, the act can be done."

This power, which belongs to the President of the Senate, Congress usurped in 1865, in their special legislation regarding the electoral votes, or certified lists, of eleven rebellious States.§ In the Act rejecting them they expressly admit the technical force of " receiving," that is, of accepting or rejecting, as well as the constitutional right of a State to an electoral representation ; the language of the Act is clear as to these two points, whilst its effect is to violate the fundamental law on the basis then assumed by Congress, that these alleged States were " States" in fact and yet not entitled to such representation :

" Be it resolved, etc., That the States mentioned in the preamble to this joint resolution are not entitled to representation in the Electoral College (*sic*) for the choice of President and Vice President ; and no electoral votes shall be received, or counted, from said States."

* Chapter xiv., "A New Law," sec. i.

† Chapter iv., page 84.

‡ Chapter iii., page 59.

§ Appendix, "Act of 1865."

The intent here was undoubtedly a laudable one, in the prevention of an injudicious and possibly harmful representation; but it was unwisely executed in framing a statute, which denied the right of representation to a "State,"—a right which the Constitution has emphatically affirmed.

The resolution, however, was signed by the President, and became a law. In executing it, in the presence of the Senate and House of Representatives, the Vice President, Hannibal Hamlin, said:

"The Chair has in his possession returns from the States of Louisiana and Tennessee; but, in obedience to the law of the land, he holds it to be his duty not to present them."

By the enactment of that law, which was thus executed, Congress has shown how harmoniously a national law, prescriptive of the duty of the nation's official agent, will operate in the acceptance and rejection of alleged electoral returns. No better illustration could be made of the principles heretofore advanced in this connection, except a case wherein the law had general and not a special application.

EXAMPLES OF ITS OPERATION.

It is manifest that the List provided by the Constitution is a *bona fide* list, as well as a list proceeding from a *bona fide* State, having a *de facto* Government; ulterior questions concerning a *de jure* Government belong to the State itself for determination, in the very nature of things, except in the case of insurrection or rebellion. Such States are entitled to a recognition as members of the Union, whenever they so present themselves, whether by their representatives in Congress, their enactment of laws, or their Electoral Colleges. As respects the election of a President, the Electoral Lists emanating from them are legal or illegal, and it is incumbent on the official agent of the nation to discriminate as to their legality; as would any canvassing officer, in receiving papers purporting to be valid returns, find upon the papers themselves the evidences of their validity.

Such returns may issue from a State, wherein there has been no election; and, as agent of the nation, being the nation *quoad hoc*, and knowing that there has been no election, the President of the Senate rejects them. He sees in the very presentation of the paper a fictitious return, which is therefore illegal.

He is not required to receive the returns of "all" the States; as, in

the next paragraph, he is required to open "all the certificates." Therefore, as in the case of New York in 1789, he may not have received a certain return, and so is not required to produce it before the Senate and House.

The returns, duly forwarded by the Electoral College, may not have reached him; and he therefore could not have received, nor is he held responsible for them. The law of 1792 specifically provides for such contingencies as this.

A list may reach him from Montana, or some other Territory in the United States, or from some State out of them. With or without a law to guide him, he rejects it; for, as the nation's agent, he knows that the returns from the former do not proceed from a State, and that the source of the latter is without the limits of the Union.

This method of procedure is not only a judicious method in itself considered, as clearing the way to the production subsequently of only the legal lists, but it is a necessary one under the terms of the provision. The official Reception of the Lists includes everything to be done down to their opening before the Senate and the House; and it is expressly provided that, on that occasion, the only two functions to be performed are "opening and counting" the votes. Where then are to be settled the questions of accepting and rejecting legal and illegal returns? They must arise from time to time, and they must have some conclusive determination; the facts of our political history furnish many instances of such exigencies.*

RECEPTION BY CONGRESS IS USURPATION.

We have seen that Congress have practically declared their right to determine such matters, not only by the act above recited, but by the tenor of all their recent proceedings. It was to settle just such questions, in the first instance, that the late "Electoral Commission" was established, though collaterally they decided questions as to the votes of alleged officers of the United States.

But, by what provision in the Constitution, either in the letter or the spirit of that instrument, do they obtain the prerogative of *cannassing the lists?* The "opening of the certificates" is to be performed by the President of the Senate exclusively, before the Houses

* Chapter iii., page 40.

as witnesses to it,—that is fixed beyond peradventure. There then remains but the seemingly indefinite phrase, “and the votes shall then be counted,” upon which they can depend for such authority.

In the first place, the whole tenor of that phrase emphasizes the fact that the votes have been duly laid out, and are ready to be counted;* in the second place, they are not an organized convention, which can discuss and decide such matters, dating back beyond the Opening of the Votes to their Reception;† in the third place, the President of the Senate is specifically charged with the duty of formally receiving them; in the fourth place, he has the returns in his possession, and if he fail then to produce them, Congress cannot pass on their Reception; in the fifth place, he may be responsible for any fraudulent retention of them, but that alone will not produce them before the Houses; in the sixth place, the Constitution has provided for an immediate declaration of the President-elect, so that time may not be wasted in procuring them;‡ in the seventh place, the law of 1792 has provided for a count of the votes which are produced, without reference to the votes which may not have been received; and in the eighth place, the power of officially “counting” the votes conveys no right of officially “accepting, rejecting, producing, and opening *the lists*,” except by an implied grant of it, which violates every principle of the law of implication; to say nothing of a ninth, and the best reason of them all, that the execution by Congress of the trust of “receiving the lists,” violates the fundamental principle of the Electoral System. On what grounds, then, legal or *ex necessitate rei*, may Congress usurp an express power, vested in a special agent, and convert it into an engine for battering down the expectations of their political adversaries?

They fall back entirely on an implied right, conveyed only by an implied right to “count the votes.” That secondary implication must be contained in one or the other of the two words, “count” and “votes.” As to the former, it could only ensue from a total overthrow and reconstruction of the law of implication, which concedes no more than the *necessary means* of executing a grant;§ and as to the

* Chapter viii., “Counting is Computation.”

† Chapter ix., “The Joint Meeting.”

‡ Chapter v., page 114. § Chapter ix., “The Powers of Congress.”

latter, the votes are *the record of the ballots*, and they demand recognition, by reason of an ample authentication of them by the Electors, provided they have been cast as the Constitution has directed.* Conceding the right of "canvassing the Votes" to Congress, it is absolutely impossible for them to deduce from it the right of "canvassing the Lists." In no way can they, at the time of counting the votes, resort to the official Reception of the Lists, except by flagrant violation of reason and law.

It is not too much to expect that Congress will usurp the right and violate the Constitution, if thereby the ends of party policy may be accomplished; but it is equally proper to expect that the people will call them to account for so doing, and force them to a strict compliance with their duty.

DUAL RETURNS.

We are now face to face with another exigency which may arise in this connection, and which therefore demands investigation, viz.: the transmission to the seat of government of "dual returns."† Who shall decide between them?

Let the significant fact be noted, that in the first "electoral period" of our political history, the preparation of a second set of returns seems to have never suggested itself to the local factions. More than once most spirited Presidential contests were waged, and resort was had to every possible line of party tactics to win the victory; the serpent, Fraud, erected its bold crest at times, and wrapped its coils around the framework of the Electoral System; but it never took the Hydra-headed guise of two or more unlawful returns, which it has assumed so often of late. The legislation of 1792 went no farther than to prescribe an authentication of the Electors by the Governors of the States, which was to be closed from view within the sealed certificates; and which was designed to be the evidence that the persons casting the votes of the State were her appointed representatives. Nevertheless, no dual returns appeared at any time, because the powers and duties of the President of the Senate, as the nation's agent in accepting such returns, were fully understood and determined.

* Chapter iv., page 94.

† Chapter iii., page 57; and Chapter v., page 114.

Three times, during the second "electoral period," the question arose of the legal *status* of a State in the election; but, as has been shown, it was compromisingly neglected. Congress thus refused to exercise authority in the premises, and so gave local political factions to understand, that the right of intervening in a State's affairs for party purposes would not be by them assumed. During all those elections, therefore, no dual returns presented themselves for adjudication.

At the outset of the third "electoral period," Congress assumed the largest jurisdiction over the internal affairs of the States, and, in execution of their reconstruction policy, threw out two returns in 1865. By that act they proclaimed to every political bummer in the land, that they were open to innovations whereby a State's right of representation in a Presidential election might be manipulated to conserve the interests of party policy.* The result has been a flood of fraudulent returns since that time, culminating in the transmission of two, three, and four returns from four different States in 1877.† There is no avoiding the conclusion, that Congress did deliberately invite these fraudulent lists; and that they most probably never would have been emitted, if Congress had not declared their right of judgment over them. And the conclusion of the whole matter is that these fraudulent returns have at length seated in the chair of our chief magistrate a President who was not elected to it.

Under a righteous execution of the Constitution, and when a law is passed defining the exact *status* of the State Government, which may claim recognition at the Reception of the Votes,‡ dual returns will never present themselves. The statute having exactly defined what list shall be received, none other will be made. If the citizens of a State shall feel themselves aggrieved by a fraudulent representation, they will take the necessary steps to lay the case before the courts for adjudication and determination; and never again will the country be disgraced by the establishment of an "Electoral Commission," whose settlement of such questions is accomplished only by a strictly partisan division of their determining votes.

Should some fortuitous chance evoke them, they will be transmitted,

* Charles Pinckney, in 1800, predicted dual returns as resulting from this same cause; *vide* "Pinckney's Speech" in the Appendix.

† Appendix, "Annals of Congress," 1877.

‡ Chapter xiv., "A New Law," sec. i.

as the law directs, to the President of the Senate, who, acting for the nation, will know the State and its *de facto* organization, and officially receive the lists issuing from it. Dual governments are possible at any time and in any State under our political system, and one of them is the *de facto* government, which has a primary right to recognition, until the *de jure* government be determined.*

In appearing at the Opening of the Votes before Congress, who are present to witness the faithful execution of his trust, it will be his duty to state the facts of such transmission, and the reasons causing their rejection, according to the ordained law.

Such a performance of his duty by the President of the Senate is even not unknown to our own political history, though its existence seems to have been unnoticed, or forgotten. At the Opening of the Votes in 1873, the following statement was made by Schuyler Colfax, then Vice President, to whom had been presented a second return from the State of Arkansas: †

"On the fourth or fifth day of February, during the present month, a person, claiming to be the messenger commissioned to bring the electoral returns of the State of Arkansas, presented himself at the Vice President's room with a paper, not in the form of law" (i.e., indorsed) "but addressed to him as President of the Senate, and stated to him what he alleged to be its contents. The Vice President said he would open the paper, as it was addressed to him: but he would not receive it, even informally."

Not a word of objection was uttered by the witnesses, and this execution of his function has passed into history. It is a striking illustration of the lawful method of procedure, developed in this discussion. It is not a new invention, as it should not be; but, being as old as the Constitution and devised by the sagacious authors of that instrument, it has a better claim to recognition than any scheme which modern wit has yet suggested.

The perfection with which this plan will operate, the existing distressing party strife from which Congress will be then exempt, and the disastrous influence of present usage on the prosperity and morality of the nation, which will thus be averted, are sufficient to commend it to the minds and consciences of the country's statesmen.

* Chapter iii., page 58.

† Appendix, "Annals of Congress," 1873.

CHAPTER VII.

OPENING THE CERTIFICATES.

"It is important that, in a free country, those entrusted with its administration confine themselves within their respective constitutional spheres, avoiding, in the exercise of the powers of one department, to encroach upon another."—GEORGE WASHINGTON.

HARMONY OF LAW AND SYSTEM.

"THE President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates."

All doubt as to the constitutional origin of the Electoral Lists having been dissipated by the process of official Reception, the next necessary step in the business of electing a President is to disclose their contents, to the end that the persons chosen may be ascertained.

It is obvious that the mode of ascertainment must be fixed by the Constitution, because it is a vital part of the Electoral System, whose principles are at stake until the President is declared. Therefore no necessary step must be left to doubt, or future settlement, for fraud and corruption, the bitter enemies of its perpetuity, would certainly creep in and destroy it. We must suppose that the Fathers understood this, we know in fact that they realized it thoroughly, and it must therefore be conceded that they adopted measures to prevent it. Those measures are contained in the short, simple, specific and practical provision above quoted; and it must be held, on this account alone, to be broad enough and strong enough to cover all the ground and reach the express end for which the System was designed.

A just and rational method of determining the force and meaning of the provision, therefore, is to follow Blackstone's fundamental rule:

"The most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it, or the cause which moved the legislature to enact it."

Pursuing this plan here, we would at once reach the conclusion that the provision was framed for the express purpose of preventing all Congressional, governmental and popular interference with the determination of the lawful electoral votes. To that conclusion we are driven by the irrepressible logic of the System, and the announcement may be boldly made, on that solid ground alone, that this is the chief end of the clause before us.

Further, it has just appeared, that the spirit of the Electoral System permeates the function of "receiving" the votes, and we may therefore anticipate its vitalizing presence in the "opening" of them.

And again, the framers of the Constitution were exceptionally intelligent and able men, and we therefore can so confide in their wise employment of language, in constructing this unique System, that we may expect indubitable evidence of their purpose to be found in the text itself.

It is obvious that Congress have not found a prohibition of their authority in it; but then we have seen that they have failed to find it in other like express provisions. The *adynamum* of the System has not been sought, wherefrom its spirit might unfold the oracular phraseology of its clauses; but other instances have transpired where darkness has been sought, instead of light. And it has been found likewise, that lust of power and party zeal have more than once unscrupulously rejected evidence, ignored the facts, and overridden the provisions of the Constitution with reckless and destructive wilfulness. Therefore we must expect all these things here as well; though we may be assured that, justly and rationally considered, impartially and carefully weighed, this clause will be found, vitalized with the true spirit of the System, to vindicate the wisdom of the Fathers in constructing it.

OPENING AS "BREAKING SEALS."

The vulgar meaning attached to the function of Opening the Certificates, is "breaking the seals"; that is, unsealing the packets which enfold the certified lists, so that their contents may be examined.*

This interpretation arises from the fact that the Electors, after listing, certifying, and signing their votes, are required to "seal"

* Chapter vi., page 133.

them up securely from observation, before transmitting them; therefore, as it seems to have been argued, they arrive before the Senate and the House shut up from sight, and, in order that they may be examined, they must be opened; and that the Opening prescribed is the breaking of the seals, which close them. On this construction the custom has obtained for some years back, that the President of the Senate should gravely take the packets out of his "strong box," and ceremoniously break the seals of the envelopes, producing the Lists, prior to handing them over to Congress to dispose of them.* The last performance of this royal farce has been described as "an august ceremony"; and it must have been, in consideration of the momentous issues hanging on the transcendently important act of opening envelopes!

Let it be observed that this was not the original custom established by the authors of the Constitution. The President of the Senate not only opened the papers containing the votes, but he opened the votes; that is, he read the certificates, and disclosed the votes which they included. In 1789 he "opened the votes"; in 1793 he "opened and read the certificates"; and in 1797 "he took the packet and broke the seal, and read the certificates," and "the papers were then handed to the tellers who noted the contents." The Annals of Congress exhibit no change in this custom until 1805, when Aaron Burr haughtily required the tellers to perform the duty for him; and subsequently, no mention is made of their reading the certificates, until the year 1817. From that time forth the habit began to fix itself, with some exceptions, until at length the tellers assumed the whole management of the Vice President's official business;† and during late years it has been regarded as a right, inherent somehow in the Congress, and to be exercised through their appointed "hands," the tellers. Without warrant of law, the President of the Senate has been degraded from his proper station, and his official dignity is fed upon the "unsealed" husks, from which the Certificates have been abstracted.

This very usurpation on the part of Congress declares their own opinion, that a much higher duty is herein involved than simply "breaking seals"; they recognize the duty, but refuse to see that the

* *Vide* the method pursued in 1877, Appendix, "Annals of Congress."

† Chapter i., page 20.

Vice President is selected to perform it. During the progress of their assumption of the right of canvassing, their leading argument has been, "Are these two Houses assembled here, in this formal and peremptory manner, to watch the opening of a few envelopes? Unquestionably, No! It is that we may canvass the votes produced from those envelopes." On the strength of such an unsubstantial and unlawful argument, for years they have regularly taken possession of the lists as soon the enclosing seals were broken.

However weak such logic is as basis for their usurpation, it illustrates the prevailing sentiment that something more must be designed, from the very nature of the case, than breaking seals or unfolding papers. Let us adopt the argument so far, and add some others to it.

It is a very significant fact that the "President" of the Senate is selected here; not accidentally, or because he is the presiding officer, but specially and with evident purpose.* The direction is not given to the "Senate" to open these certificates, whereby the formal duty of presenting them would naturally fall on their presiding officer; it is not provided that the two Houses shall open them, with the President of the Senate as a spectator of the business; there is no institution of a joint convention, whereat the President of the Senate shall preside,† and which shall take charge of and control the votes; and it is out of question that the House can assume prerogative, by reason of its express limitation to the President of the "Senate." But there are three parties here brought face to face, two collective and one individual, of whom two are to be Witnesses of the legal execution of his duty by the third. Is there not in this peculiar arrangement proof enough that that duty must have been designed to be an exalted one, of high official value, and not the trifling one of "breaking seals"?

The President of the Senate too, as has just been seen, has lately been engaged in the important political business of Receiving the Lists, picking out the lawful from the illegitimate, and is yet in personal and responsible possession of them. In clearer terms than that devolving this first trust on him, he is now invested with another, and all the reasons, arguing to the importance of the former,‡ concur in proving this as high, if not a higher one.

* Chapter xi., "The Electoral System Presented."

† Chapter ix., "The Joint Meeting."

‡ Chapter vi., page 132.

The only function which the two Houses are directed to perform is Witnessing; and they can only witness what he pleases to enact before them. By force of the construction of this clause they can claim no possible authority over the Opening, even if they may when the certificates have once been opened. Therefore the responsibility is entirely thrown upon him to "open the certificates" heretofore received, which retains him in the high position of an agent of the nation. Producing the certificates may be a necessary adjunct of his duty, but it is only because it is included in the higher function of officially opening them.

In the event that he refuses to produce a return, it is impossible to enforce the Opening of it. This was illustrated in the recent Congressional proceedings, when demand was made that he open an alleged return from the State of Vermont,—he pointedly refused to do it.* It is true that any officer may refuse to do his duty, but the fact remains nevertheless, that, as the Witnessing is obviously powerless to procure the Opening, we must look for some other purpose in it.

This formal Witnessing cannot be prescribed in order that he may be forced to "open the envelopes" publicly, for it would not compel that end. If only "breaking seals" is meant, he may open them in secret and untrammeled, provided that he seals them up again; and the public Opening is nothing more than a farce, with this mean interpretation placed on it. Certainly the Fathers were not so weak as to expect regeneration of official morals by means of such a hollow spectacle.

Besides, what end could the Vice President accomplish by such anticipatory examination of certificates, which are presently to become public property? He cannot alter votes and make his forgeries effective in electing candidates, for the fraud would be too easily exposed. And the absurdity of anticipating such secret opening is obvious at present when every vote contained in the returns is public property from the day that it is cast. What folly, then, to explain this vast assemblage as Witnesses to witness publicly that he has not done something privately!

It cannot be that the two Houses were appointed Witnesses in order that they might procure the opening of the returns from "all the

* Appendix, "Annals of Congress," 1877.

States," for not thus can that end be attained. He may not have received them all, or they may not all have been sent; and it must be held that they can witness only to what is done, and not what is left undone. They cannot know that he received returns other than the ones produced, and it is impossible for them to enforce honesty when they are ignorant of fraud.

It thus appears that the pith and marrow of the ceremony are extracted by a reduction of the act of opening to "breaking seals"; and that the provision is itself emasculated, by interpreting this Opening as a mere clerical duty, and the only one enjoined upon this high official, on this occasion full of national importance.

Undoubtedly the President of the Senate may break the seals and unfold the lists; but it is fairly reasonable, from these considerations, that he was selected as the agent of the nation here again for more responsible official duties than these two alone.

The very fact that the Constitution prescribes Opening as an essential act in electing a President,—the great Fundamental Law of the United States directing the process of the most momentous political transaction in the nation,*—is a guarantee that Opening is an important, a grave, a capital, a fundamental function. The Fathers wasted no words, prescribed no mere formalities, and never trifled when founding our Magna Charta.

"CERTIFICATES" AND "VOTES."

Let us consider the exact meaning of the word "certificate."†

The Electors are to vote by ballot for President and Vice President; these Ballots now become the choice of the several colleges, and must have their full value in electing those two officers.

In order that this result may follow, and as the best means of accomplishing it, a list of them is made, which contains the names of all the persons voted for, and the number of votes for each. This list, then, is a simple memorandum of the votes; and the record thus becomes, in a different shape, "the Votes of the Electors," which are to be transmitted to the seat of government in the stead of the original Ballots.

We have seen that the Constitution has endeavored to anticipate, by

* Chapter ii., page 26.

† Chapter v., page 127, and Chapter iv., page 91.

certain precautionary safeguards, the evil influence of frauds ;* and it is obvious that, as the Electors are now *functus officio*, these Votes must be accompanied by such evidences of their authenticity and of their compliance with the law, as that they will not only be the *prima facie* Votes, but that they will be clearly shown to be, and recognized as, the legal Votes. Nothing less than their perfect identification will satisfy the spirit of the Electoral System. Therefore the Electors are required to sign their names to the Votes, and to certify categorically to their obedience to the forms of law. The Votes have now become the official "Electoral Votes," and belong to the United States.

It is manifest then that the relationship between the Votes and the Certificates, is the relationship between the human soul and body ; the former are the real substance of the Lists, while the latter are the transient forms *inclosing* them ; the former are the vital units which take part in the election, while the latter are the legal evidence by which we recognize them.

The following is an ordinary form of Electoral Certificate, not however prescribed *verbatim* :

"We, the undersigned Electors of the President and Vice President of the United States, appointed by the State of New York, do hereby certify, that, pursuant to law, we met at the city of Albany, in the State of New York, on the 6th day of December, A.D. 1876, and balloted for President and Vice President, with the following result, to wit :

"For President of the United States, Samuel J. Tilden, of New York, thirty-five votes ;

"For Vice President of the United States, Thomas A. Hendricks, of Indiana, thirty-five votes.

"In testimony whereof we, the said Electors, have hereunto signed our names, date and place above written."

[Signed by the Electors.]

In compliance with the Act of 1792 there must accompany the foregoing a certificate from the Governor (unknown to the Constitution however), duly authenticating the appointment, pursuant to law, of the Electors, who have thus authenticated their own votes.†

From this example it will be seen that these two Certificates contain

* Chapter v., page 111.

† Chapter iii., page 54.

a recital of all the evidence essential in the ascertainment of the legal Votes. And it is obvious that at this stage of the proceedings the Certificates are the more important, because they do contain such identification; but that the Electoral Votes, the constitutional Votes, are the prime facts within them, which are to be ascertained. Therefore Certificates and Votes are practically identical, or convertible terms.

This is proven further by the language of the concurrent resolution of the Convention* which directs the Electors to "transmit their Votes, certified, signed, sealed, and directed," and which subsequently provides for "receiving, opening, and counting the Votes." In like manner the Annals of the 1st Congress in 1789 refer to it, in recording the election of a President of the Senate, and he himself affirms it in declaring his official execution of the duty.†

James Wilson, discussing the Electoral System before the Pennsylvania convention in 1788, uses the following language:

"If the election be made as it ought, as soon as the Votes are opened, and it is known that no one has a majority of the whole, there can be little danger of corruption"; etc.

And Justice Story, in his Commentaries, remarks at Sec. 1452 that, at this time, "the Votes are to be opened," and at Sec. 1464 employs the phrase "to open the Certificates," manifestly as a synonymous expression.

The identity of Certificates and Votes is important here, as fixing the exact purport of the function involved; the want of an apprehension of it has frequently led to confusion, in attempting to expound the passage.

It is now clear that, whatever the Constitution may mean by "opening the Certificates" or "opening the Votes," it does not mean "breaking the seals of the Lists." This is demonstrated as well by the preceding argument as by the actual interpretation given it by the Framers and expounders of the text.

OPENING AS "UNCLOSING LISTS."

Again, if Opening be interpreted as "unclosing the certificates," in the sense of unfolding papers, how can the Certificates—using the word in its necessary technical sense—be unclosed?

* Appendix, "Resolution of 1787."

† Appendix, "Annals of Congress," 1789.

A Certificate is not a paper, that can be folded up and sealed ; it is an impalpable, immaterial authentication, as has just been set forth ; it has legal existence alone, and is committed to writing only that it may reach the mind which it is designed to influence. It is of the nature of "evidence," which has weight and value not as a writing to be set before the eye, but as imponderable testimony to be accepted by the judgment. We have seen why its preparation was enjoined on the Electoral Colleges,* and that its purpose was the identification of their votes ; therefore the sense in which it is again employed must be exactly its original sense ; and we translate it in the clause accordingly, as, technically, "the authentication of the votes." How then can the President of the Senate physically "unclose an authentication" ?

Loosely speaking, a written paper of the kind may be called a certificate ; but technically and legally the term cannot apply to the paper written on. By the Constitution the paper is denominated a List, and the Certificate is the testimony. The Opening therefore, provided in this clause, cannot be held to be a physical unfolding or unclosing of the certificate.

It is necessary in any rational discussion of the Constitution to thoroughly disabuse the mind of what seems to be a lurking fancy there sometimes, that the Framers of that instrument were playing at founding an organic law. As before adverted to, they were in sober earnest, and they undertook the task as able, educated lawyers, using legal phraseology and expecting that hereafter their work would have a strictly legal interpretation. Therefore we must regard all these fundamental words and phrases as technical, so ordained and sanctioned by their use of them, and to be so construed in any definition of the powers devolved by them.

As we analyze Certificates, so we must examine Votes, and regard it as a technical and legal term. In the Certificate, as they lie, they represent so many individual mental acts of choice by the Electors, of which they are the register and index. They are not ballots, nor any other kind of papers, which may have a physical disposal ; they only represent the ballots, and, as authenticated facts, address themselves to the official mind empowered to examine them. The President of the Senate clearly cannot physically "unclose the votes."

* Chapter iv., page 93.

There is one thing which he may thus unclose, and that is the List, whereon these authenticated votes are recorded; that is obviously a physical possibility, made still more possible by the fact that they were directed to be "sealed." Doubtless he does, at every opening of the votes, unseal, unfold, and unclose these Lists; and this word must have its technical significance as well as the others. But it is patent that the Lists are not identical with the Votes inscribed on them, nor yet with the subscribed Certificates; they bear the same relation to the latter terms as does the corn-husk to the substantial ear within it. It follows, therefore, that when the President of the Senate was commissioned to "open the Certificates," or Votes, he was not directed to unclose the Lists inclosing them.

And yet, with total disregard of these clear and necessary distinctions, have Congress interpreted this provision, for years back, as the unwarranted Opening of the Lists!

OPENING AS "DISCLOSING VOTES."

If the Constitution had intended this official duty to be the mere unclosing of the Lists, it would certainly have used the word. In the preceding clause it is used twice, both times in the same sense exactly; the Electors are to prepare Lists of their certified votes, and transmit the Lists to the seat of government, directed to the President of the Senate. These Lists are therefore, in their technical, constitutional sense, certain sheets of paper, written upon officially, which may be folded, sealed, indorsed, and transmitted, all of which the Constitution expressly or impliedly requires shall be done with them.

It is clear then that, had it been designed that the official agent should open them, the word Lists would have been employed; this conclusion cannot be avoided.

Instead of which the Framers carefully select the entirely new and different word, Certificate, and direct him to open that,—that is, in the presence of the Senate and House of Representatives, the President of the Senate shall officially "open the authentication of the votes."

There are three things, and there can be but three things, necessary as the official means of making the votes of the Electors, after they have been transmitted, effectual in the choice of a President, viz., 1st, the lawful Lists, or indorsed packets, must be officially identified and

received ; 2d, the illegal votes in them must be officially identified and rejected ; and, 3d, the Votes remaining must be counted, because they are the legal votes. We have seen that the Lists are disposed of officially by the reception or rejection of them ; in the succeeding phrase we see that "the Votes shall then be counted" ; and it follows logically, that the Opening of the Certificates, authenticating them, was designed to be the official identification of the Votes.

It is impossible in reason that the Constitution could have used any other word, at this stage of the proceedings, than "Certificates," because it is the *Certificates* which *inclose* the Votes ; and it is equally impossible that "Opening the Certificates" can have any other meaning than an *unclosing* or disclosure of their contents.

The contents of the Certificates are the Electoral Votes,—not the spurious and void, but the lawful and valid votes,—from which the chaff must now be officially winnowed. The Votes represent the States in the election, and must have recognition ; but they must also show that they have complied exactly with the law. Those so-called votes, which have not thus complied, are spurious, illegal, invalid, null and void ; they represent no State, and are entitled to no recognition. There are not good and bad votes to be found in these Electoral Lists ; they are votes or no votes, according as they comply with or violate the law.*

Therefore the Opening of the Certificates is an Opening or Disclosure of the *legal* Votes.

It is thus again apparent that the two words, Votes and Certificates, are legitimately interchangeable, and the reason is now explained, wherefore the Fathers thus employed them. "Opening the Certificates" is Disclosing the Votes, and "Opening the Votes" is Disclosing the contents of the Certificates. To this we may add that, the Certificates being evidence and not papers, it is proper to speak of opening, unclosing, or unfolding evidence, and that this is precisely what the Constitution means. In this case it employs the technical word Certificates, because it is only by opening them up that the true votes can be disclosed ; they are the necessary authentication and identification whereby the official agent must perform his duty.

This transpires also from another consideration. The Electoral

* Chapter iv., page 94.

Lists were required to be sealed, but this sealing was in no wise meant to be the identification or evidence of the Votes within; its object and intent was to secure them from inspection, to keep them secret. Secrecy, being then the spirit of the act of sealing, its opposite, Disclosure, must inspire the act of opening; and, since the Votes have hitherto been kept secret, they must now be disclosed. An Opening of the Lists may break the seals, but an Opening of the Certificates must be held to break the secrecy.

In the sterling English of the Bible is an excellent illustration of this distinction, where the Prophet, in Revelations v., tells of the wondrous secrets written within a great Book, which no one was found worthy to disclose. The following phraseology is used: Verse 2, "Who is worthy to open the book, and to loose the seals thereof?" And, in verse 9, when the Lamb has taken it, the hosts of Heaven shout, "Thou art worthy to take the book and to open the seals thereof."

Such a significance attached to "open" is very common, and the ordinary usages of language sanction it. A simple example occurs in the expression, Open your heart to me; which can hardly be understood as a physical operation, but rather as an invitation to disclose the secrets of the heart.

Furthermore, an examination of Johnson's Dictionary, which was the standard authority of a century ago, exhibits the fact, that the most common definition of the word forsakes the merely physical Opening, and enlarges its signification to meet the other various uses of it. The verb, "Open," is there defined as, "unclose,—show, discover,—explain, disclose"; and to these is added by Worcester, "make clear or manifest," and by Webster, "reveal, bring to view." So that lexicographers give seven words or phrases as synonymous with Open in its larger sense, to one with the restricted meaning of the physical "unclose"; whilst "unclose" itself is often and legitimately used in referring to evidence and other matters immaterial.

We then ascertain that, in affixing this logically necessary definition to "Open," we are employing it in its ordinary acceptation. It is in no wise a strained interpretation, but a natural one, and it conforms strictly to the rule laid down by the Supreme Court, in 1 Wheaton, 324, and to all other rules of interpretation:*

* *Vide* other rules in Chapter ii., page 35.

"The Constitution, like every other grant, is to have a reasonable construction, according to the import of its terms; the words are to be taken in their natural and obvious sense, and not in a sense either unreasonably restricted or enlarged."

In the presence of the Senate and the House, as those Certificates are now, they are simply evidence of the legal and illegal votes thus authenticated; and Congress have always held them so to be, by maintaining their right of judging them, and by taking and admitting other evidence to counterbalance them. But, by one of those curious inconsistencies, from which our statesmen-lawyers have not always been exempt, when the Constitution declares that "the evidence shall be opened," they have limited the duty of the appointed officer to the unclosing of the paper bearing it.

Hereby they defeat not only the logical, the natural, and the technical significance of the word, but its ordinary legal meaning; for in this organic law it must be held to have a legal signification. The "opening of a case" is a declaration, or disclosure, of the pleadings in it; the "opening of a court" is an announcement, or disclosure, of the fact of its readiness for business; and the "opening of a will" is a disclosure of the contents of the instrument.

In an argument, marked by its exact and forcible phraseology, before the recent "Electoral Commission," February 15, without intending any definition of this provision, Mr. Wm. M. Evarts employed the following natural and pertinent language:

"In the transaction of an election, which starts from the primary polling-places, and proceeds to the point of developing and accrediting an Elector, up to the *scrutiny* so far as it is *opened* here, and the counting of the electoral votes," etc.

And, in another legal argument by him before the same body, February 5, occurs a very pretty illustration of how a capable lawyer of to-day employs the identical thought of preparation and disclosure in relation to general evidence, which the capable lawyers of a century ago employed in relation to the evidence in the Certificates:

"The other question,—as to whether *evidence*, in the possession of either House or both Houses of Congress (in the shape of committee reports, or conclusions of either of those great bodies, in any form), is transmissible, and may be proposed to this Commission, and may be accepted and received by it,—after it is *unfolded*, after it is

understood, after the claim is scrutinized and opposed,—is a question that is but a subordinate part of the main question."

Substitute "opened" for "unfolded," and his meaning is retained, whilst the use of that word in the Constitution is further illustrated.

We may then, by force of these considerations, adopt the conclusion that, in the case before us, the constitutional duty to be performed by the President of the Senate, is the Disclosure of the Electoral Votes.

The reason that the word "Votes" is not used instead of "Certificates" is, that the Certificates are of the first importance here. The Votes are to be opened up, but that can only be accomplished through the Certificates, which inclose them; and, to direct that the President of the Senate shall "open the Votes," would have been to introduce a confusion of ideas, resulting perhaps in an unwarrantable custom of disclosing votes without reference to their authentication, when the unscrupulous designs of party policy suggested it. The Fathers were very wary in shutting every avenue to fraud or folly in electing Presidents, and they, no doubt, surmised that they had succeeded here; it certainly could never have entered their imaginations, that an express direction to "open the Certificates" would be perverted into a practice of "opening the Lists."

Doubtless the custom would never have sprung up, had not the inherent tendency in Congress to usurp prerogative and power, step by step entrenched on this as well as other provisions of the Constitution.

DISCLOSING AS "CANVASSING."

In further analyzing the "Opening of the Certificates," we must next consider the effect of the disclosure, the result to be attained by it.

In ascertaining this, we must first realize what is to be disclosed. As heretofore explained, it is the Electoral Votes, the official factors in determining the President. It is not, observe, the votes of the Electors; they were disclosed finally when the ballots were cast in the respective States; since then they have become the property of the United States as authenticated facts, and the Certificates are the evidences of their legality. In disclosing them, therefore, something more is required than reading the List over; that may disclose the votes of the Electors, but cannot disclose the true Electoral Votes.

An Electoral Vote is not a choice of President by a citizen of the

United States. It must be cast by an Elector, chosen on the day prescribed by Congress and appointed by a State of this Union, who is not a Senator, or Representative, or officer of the United States, who is not under the disability of the XIV. Amendment, and to whose representation the State is entitled; it must further have been given by ballot, within the Elector's State, and on the day prescribed by Congress; it must have been registered duly on a List, as given for a President and Vice President, who are thirty-five years of age, citizens of the United States, and one of whom is not a resident of the same State; the List must be certified and signed as the *bona fide* act of said Elector, and it must be in possession of the President of the Senate by or before the day prescribed for the Opening and Counting of the Votes.

A vote therefore, which can be identified as complying with all these prerequisites, is an Electoral Vote; a vote, which does not comply with any or with all of them, may be the vote of an Elector, but it is not an Electoral Vote.

A disclosure of an Electoral Vote is thus accompanied by the rejection of all others which are not Electoral Votes; being an official act, it carries with it the power of discrimination, which belongs to the execution of all official duties,—not impliedly, however, as in some instances, but expressly by the terms of this provision. The rules by which an Electoral Vote is recognized are laid down plainly and specifically in the Constitution; and the evidences of its official existence are to be found perspicuously in the certificate, or certificates, accompanying it.*

A disclosure of the Electoral Votes is thus shown to be a canvass of the votes of the Electors, by the application of the standard of the Constitution to them; it is not a judicial duty, but a simple ministerial one, as canvassing is held to be by the courts; it is not performed by gathering evidence *aliumde* the Certificates, for they contain within themselves every item of the evidence required; it is the United States, politically omnipotent, omniscient, and omnipresent, who are opening them, and they are presumed to have possession of all the *data* requisite.†

The necessity of a canvass at this juncture seems always to have

* Chapter iv., page 94.

† Chapter iv., page 89.

been agreed upon. In later times, however, the proper party to perform it has not been agreed upon, and, as the larger and more powerful body, in the dispute between the President of the Senate and Congress, the latter have absorbed the right, on the principle that "might makes right."

If in the canvass a vote does not comply with the forms of law, whether it is because of neglect, or fraud, or for any other reason, it is rejected, the Electors, the State, and the people to the contrary notwithstanding; if it is found according to the forms of law it must be accepted, and its influence in electing a President maintained by all the authority of the United States. These laws establish principles which must have a rigorous enforcement. A most important duty of the nation is to see that none of the States lose their rightful representation; but the paramount duty is to see that no votes violating the letter of the law are admitted, for they corrupt the most exalted station in the land.

This disclosure of the Electoral Votes must be public in the very nature of the case, as well as by the constitutional requirement that it be "in the presence of the Senate and House." Therefore it involves a publication and declaration of the legal votes; and that, at this time, issuing from the United States, is conclusive of their validity.

If for a moment we revert to the earliest practices of Congress, it will be apparent that this constitutional mode of opening the votes by publication and declaration, was exactly followed.* Passing by the first occasion as informal (which it is claimed to be, but which it certainly is not), let us glance at the custom established in 1793,† and which was pretended to be followed down to 1865, when the "22d Joint Rule" was adopted.

When the Houses met as Witnesses, they were represented by three tellers, at the Clerk's desk; the President of the Senate "opened and read the certificates" of the Electors, and publicly "declared" the legal votes; as they were declared the tellers "made a list of them," and summed them up; the certificates were handed them to examine, that the correctness of the declared votes might be by them authenticated as witnesses for Congress. The certificates, then, were published and the legal votes declared by the President of the Senate.

* Chapter x., "Pennsylvania."

† Appendix, "Annals of Congress," 1793.

For thirty years after the founding of this Government no votes were rejected because of illegality, so far as the record exhibits, and the execution of the duty little by little assumed the guise of a formality; so that when the first case arose in 1817, opinions differed as to who might lawfully make the canvass; and, for forty-eight years more the point was contested, without any decision, until Congress usurped it in 1865.

THE VICE PRESIDENT'S FUNCTION.

If, from a consideration of the spirit of the Electoral System, we can arrive at the conclusion that Congress are debarred from all participation in the election of a President, except in the one case of a failure to elect, we can also, as now appears, reach it by the route of a rational analysis of this provision.

The clear proof is the command to Congress to be Witnesses of this canvass and disclosure of the votes; which in itself, though not before adverted to, is powerful evidence that Opening is a very high official act. An unprejudiced mind must conclude, from the exact phraseology and the grand assemblage of Witnesses provided, that the duty is of a most exalted grade, and could not issue in less than a disclosure of the valid votes.

It is very reasonable also that the Vice President is again selected as the agent of the nation; we have seen why he was so chosen, and know that no better choice could have been made.*

The chief objection to his right of canvassing has heretofore been this: Shall he do this, when we are here assembled, so ready and so willing to perform it? as if he were in some outrageous way exalting himself above Congress. It is as ridiculous as to charge him with a usurpation when he succeeds to the Presidency, whilst millions of good citizens are shut out of it.

It has often been alleged that such a power in one man's hands is dangerous,—which in itself is a very weak argument. The power must be lodged somewhere, because its execution is demanded, and in whose hands would it prove less dangerous? Certainly not in those of the two Houses, if we are to judge by the history of the past, and especially by that of our last election. If, with no law to guide him

* Chapter vi., page 132.

but the letter and the spirit of the Constitution, he could not canvass the returns more expeditiously, efficiently, and lawfully than have they, assuredly he could not canvass them with less satisfaction to the nation or less disregard of justice!

It is much better always to concentrate a guarded responsibility upon one person, when it is heavy and exacting, than to divide it up, unguarded, among five hundred, when it becomes weak, or is lost sight of altogether. The Fathers knew this well, and they therefore laid it upon the President of the Senate, and placed him before the Representatives of the nation, in full view of the whole country, and bade him execute his function there, with the letter of the fundamental law to guide him.

But, as in Receiving, they did not design him to declare his *ipse dixit* on the certificates, but contemplated legislative prescription of the mode of Opening. In the olden time it was not made, because the constitutional definition of a valid vote was regarded as clear and simple, and the Houses provided only for their own duty of Witnessing by concurrent resolution. Now, however, when our practices have wandered off so far from fundamental principles, it would be wise to frame a statute covering this function; indeed, it is a necessary duty of the Legislature, if they would not risk a future and more reckless disregard of law and justice, in extension of their own pernicious precedents.*

Under such a statute the President of the Senate will become again the official inspector of the electoral returns, and it will be clearly seen that it is not he who canvasses and declares the votes, but the Law of the land;† and weak-minded statesmen will no longer fear a mal-administration of an office, or a usurpation, where they have framed the law controlling it, and are present in full force to see it executed.

HIS OFFICIAL DUTIES.

The duty of the President of the Senate at the Opening of the Votes follows clearly from our exposition of the trust confided to him.

He must accept it as incumbent on him by express command, and as a solemn trust, to be fulfilled both in its spirit and its letter. As the Agent of the Nation, clothed with plenary authority, he must

* Chapter xiv., "A New Law," sec. v.

† Chapter x., "Massachusetts."

ascertain all the facts pertaining to the States and their Electors, which will be useful to him when he comes to act. He must know the necessary principles and facts, which make the vote of an Elector an Electoral Vote. He must use all diligence in procuring the returns, and have them with him at the meeting of the Houses.

Since his actions are official only when declared so by himself, he may take all the packets purporting to be Certificates, reserving acceptance of them until the Opening. In the presence of the Houses he can publicly reject unlawful lists for cause, and accept those which the Constitution has provided for.

He is bound to produce and open all the legal certificates which he has received. This word "all" has been cited as a direction that he produce every certificate transmitted to him, whether good or bad, but clearly the Constitution never has expressed or implied such an absurdity. The presumption of that instrument is that the States will transmit valid certificates, and it requires the President of the Senate to produce and open only such and all such returns. When, at the recent Opening,* he produced, and insisted on having read, a burlesque certificate from Louisiana, he sacrificed the dignity of his office and violated the spirit of the law. When, at a later stage of the proceedings, he refused to recognize an alleged certificate from Vermont, he mistook the authority of his office, and again violated the spirit of the law. In both cases to personally take the certificates was not to officially "receive" them; and in both cases, after examination, if advisable, he should have publicly declared them spurious, and given his reasons for it.

His first official duty is to test all the votes by the statute prescribing the day on which they shall be cast. If they conform to that, they are valid; if they do not, they are invalid, and the State loses her representation.†

Having an express grant of power, which Congress cannot limit, by statute or joint rule, it is his duty to learn the contents of the certificates, which he must therefore read, and he must publish them in order that the Houses may possess them as Witnesses. He should then reject such votes as are illegal, giving reasons for it, and declare

* Appendix, "Annals of Congress," 1877.

† Chapter v., page 124, and Chapter iv., page 92.

what are the legal votes. At this point in the election of a President it is eminently proper, and therefore specially provided, that every part of the proceedings shall be public, free, and frank.

As an Officer of the United States he is subject to a directory law of Congress. As one of three parties engaged, it is his duty to conform to any rules, which aid the other two in executing their duty of Witnessing.

The order in which he opens the certificates is of no practical or legal moment, since he is there to execute the law, and not to "count in" a President whom the Electoral Votes have "counted out."

THE HOUSES AS WITNESSES.

At the Opening the two Houses are directed to perform a duty, as clearly as is the President of the Senate, and it is equally incumbent on them to fulfil it faithfully.

They are in duty bound to appoint a day for opening the votes, and to be present there and then to witness it. They must make such laws as are necessary to enable him to execute his office with ease and thoroughness to himself, with perspicuity and completeness as to themselves, and with certainty and satisfaction as respects the nation.* They should select a sufficient number of persons from their own members to act as eyes and hands, who should be instructed by general law in their exact duties. They should courteously aid the President of the Senate, so far as possible, by objections to votes, or information as to facts, to the end that he may transact his business efficiently, and they must take a minute of the transactions and of the President declared elected, to become a part of their official records.

If we revert again to the practice established in 1793, we shall find that tellers were appointed to witness for the Houses; and that, by this appointment, Congress emphasized their own duty to be that of mere spectators.† When the proceedings were concluded, the tellers reported the facts back to each House, and they were thereupon spread on the journals.‡

As a concluding argument in favor of a disclosure of the Electoral

* Chapter xiv., "A New Law," sec. iv.

† Chapter viii., "The Houses Count as Witnesses."

‡ Chapter ix., "Election by the Houses."

Votes by the President of the Senate, and of the inhibition of Congress from canvassing, let us glance at the phraseology establishing their duty in the premises.*

The certificates are to be opened "in the presence of the Senate and House of Representatives."

We are still dealing with a legal instrument, and it is not at all strange that it employs the well-known legal formula "in the presence of." From time immemorial that formula has been used to import one thing alone, namely;—that the parties present are to be witnesses, and nothing but witnesses, of a transaction, executed by another.

Its most ordinary application is as "the *testimonium* clause," appended to a will, which is required to be signed and sealed "in the presence of" witnesses. Of course the duty is incumbent upon both testator and witnesses, and it is therefore laid down by the courts that they must be in the presence of each other. Blackstone remarks of a testament that "it is the safer and more prudent way if it be signed or sealed by the testator and published in the presence of witnesses." But a will, "the legal declaration of a man's intentions, which he wills to be performed after his death," could at common law be proven under certain circumstances by witnesses who were not present at the signing. In the execution of all wills a publication is actually or constructively required, and, by either common law or statute, there must be a republication when the testator materially changes a will.

The business of the witnesses therefore is to observe, for the public, the publication and declaration of the testator's wishes, over which he has a plenary legal authority at the time, and their execution by his signature; and they have no part or lot in the transaction, except as silent spectators, by whom hereafter such declaration and execution may be proven; when present at the signing, they affix their names in *testimonium* of the fulfilment of their duty.

Applying these established legal principles to the case of the two Houses, we have them present, as silent spectators, to witness the publication and declaration of the intentions of the Electors, who are *functus officio*, legally dead, and whose signature is affixed to their Will, the President of the Senate being the administrator *cum testa-*

* Chapter x., "New Hampshire and Connecticut."

mento annexo, representing the Law, in whose possession only it has been, and the entries on their journals the evidence of its contents thereafter. Add to this the logical and legal duty devolved on him of Disclosing the Electoral Votes, which we have seen is inherent in the phraseology and in the spirit of the instrument, and the lawful System of the Fathers is clearly and irrefragably established.

The right of canvass by Congress, deduced from this power of witnessing, is the most absurd of all their arguments. The function of a witness is to witness,—nothing more; and yet they claim under it the right to canvass and reject the lists, to count the votes; and to determine the President-elect. At a trial in court it would be just as legitimate for a witness to leave the stand, mount the bench, oust the judge and decide the case himself. If this phrase does not make them mere spectators, then it means nothing;—and that conclusion is inadmissible. On the other hand, if Opening be canvassing,—publishing and declaring the lawful votes,—then it is in harmony with witnessing, and the provision a consistent whole. But if Opening Certificates be “breaking seals” and Witnessing be “canvassing the votes,” then the whole provision is sheer nonsense.

CLIMAX OF THE ELECTORAL SYSTEM.

The System thus deduced is the climax of the constitutional electoral plan, whereby the legal votes are laid before the nation upon the same principle, by the same policy, and with the same end in view, as governs their origination and their progress, in its various stages, to the national official agent. The result is that it operates consistently and harmoniously, without jar or discord, and makes one grand whole of a System, whose several parts were certainly designed to be compatible and congruous.

How satisfactory to find that, after all, there is no *casus omissus* in our fundamental law, and that its framers—those sagacious old patriots such as Franklin, Washington, Madison, Hamilton, and King, who believed that their electoral plan was almost perfection—were not fools. And they would have been,—as arrant fools as ever lived,—if, after moulding their vessel so long and carefully, they had left a hole in its very centre. Though one grieves over the ignorance that has blindly broken it, he must nevertheless rejoice that it was not the fatuity of its founders.

How delightful, too, to be assured that the power of canvassing the votes is vested, fixed, and established; and that there is no longer need of resting the most important, the most delicate, and yet the most formidable function in the election, on an "implication,"—that wretched spectre whom our statesmen's midnight lamps have so often conjured up. If it be but "bottled up" henceforth and forever, the nation will be largely gainer.

And what a sigh of relief greets the fact that Congress can no longer claim the right of canvass *ex necessitate rei!* Hereafter let the people see to it that their Representatives execute the law, that they usurp no more powers proscribed to them, and that they never again imperil the nation's peace with that unhallowed plea, necessity!—as it has been fitly styled,—“that arch-fiend in government, that prolific mother of anarchy, revolution, and despotism.”

By their unwarranted interpretation, deformity and discord, difficulty and danger only can and always must ensue. The spirit of the instrument is thrust aside in deference to personal and party ends; nay, the very latter, rightly understood, is violated, and riotous disorders follow it in any close election.

It is not wisdom in this people to close their eyes to the plain facts, that for years back unlawful policies have been slowly crystallizing into precedents, whose issue now is the success of fraud and faction over law and justice; it is worse than fatuous, it is criminal neglect of their own liberties, if they fail to punish open wrong against their fundamental law, from which, unchecked, must issue other and more dangerous usurpations.

In launching their Ship of State, the Fathers saw with too prophetical an eye the dangers and disasters which it must encounter; and two great rocks loomed up before their prescience, whereon the United States might come to wreck. If disunion was the Scylla of their dread foreboding, certainly disruption by the fraudulent election of a President was its Charybdis; and history has shown, in the first century of our existence, how narrowly the nation has escaped them both.

CHAPTER VIII.

COUNTING THE VOTES.

"Facility in changes, upon the credit of mere hypothesis and opinion, exposes to perpetual change, from the endless variety of hypothesis and opinion."—
GEORGE WASHINGTON.

MISINTERPRETED AND MISAPPLIED.

"THE President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

The above provision is reproduced entire, because it stands by itself in the Electoral Section, and was evidently designed to be transacted at one and the same period of time.

An ordinary mind, uninitiated into the mysteries of political sophistry, considering the few, simple and commonplace words of the last clause, "and the votes shall then be counted," could not be in doubt and could not be deceived as to its direct and clear significance. There might be hidden import in the undefined duties of the President of the Senate, to whom the Electoral Lists are to be directed; there might be profound enigmas concealed in the official Opening of Electoral Certificates; but in the Counting of the Votes the direction is so perspicuous and so specific, that a tyro in the study of the Constitution would not hesitate at comprehending it. The natural, reasonable and direct meaning is, The votes shall then be enumerated and summed up, in order that the person having the majority of them shall be ascertained,—to which the succeeding paragraph refers.

But over this short sentence hours and days have been passed in disputation at the Capitol, and brains and muscle exerted to their utmost energies, in order that this modern sphynx might be compelled to reveal its occult riddle.* Mark the reason why! Not that its

* Chapter i., pages 12 and 14.

meaning might be ascertained, but that it might be tortured into some sort of a grant of power to Congress over the Canvassing of the Votes.

Let us note that Canvassing, in the Congressional meaning of the term, is not the appropriate Canvass which the Constitution contemplates, by the express standard which it has provided;* it soars away beyond that old-fashioned notion, and riots in the fine political region of State elections and precinct returns. In preparation for their canvass of the last returns, Congress drew witnesses by the score from the four quarters of the country, and took reams of evidence of all kinds and qualities; for the expenses of these witnesses and the printing of seven thousand pages of their testimony, the national funds were unlawfully wasted. They added illegitimately to this outlay the expense of sending Committees of the two Houses into four States, to rummage for weeks amid the nastiness of local politics, and to procure evidence which they and their constituents know is practically worthless. The people do not need the tardy acknowledgment to that effect by the Hon. Mr. Hurlbut, in a speech before the "Electoral Commission" on the 13th of February, but it is tendered in the following statement by that gentleman:

"You cannot rest upon *ex parte* testimony taken by the Congressional Commission; for, although I have the honor to be a member of one branch of Congress, my experience is simply this: that of all tribunals, or pretended tribunals, that were ever gotten up by the perverse ingenuity of man, for the purpose of inquiring into political matters, there is none so likely to be unfair, and to do injustice, as a Congressional Committee,—necessarily. . . I had the honor to be a member of the Louisiana Committee."

COUNTING IS NOT CANVASSING.

Since the legal means and legal agent of the Canvass have already been set forth, it will be advisable at this point to argue the Congressional claim rather in the way of a rebuttal, by a brief consideration of the provision and of the situation of the parties interested. In the end, however, there will be found strong confirmation of the System hitherto developed.

* Chapter iv., page 90.

The wide divergence of interpretation is a proof that Canvassing by Congress was not intended by the Fathers. Their lawyers and logicians have been driven into greatest straits to find a constitutional basis for the power; and have always fallen back upon an implication, a *casus omissus*, or an *ex necessitate rei*. What one generation has discarded as untenable, the next has founded its extensive powers upon, only to be denominated fatuous fools by their successors, who have adopted some other fine-spun theory.

The result has therefore many times ensued, that their own professed principles and practices were at variance, leading them into ridiculous inconsistencies and sometimes defeating the very end in view.* As one instance, their universal practice has been to respect this plain provision for computing the votes, by retiring to their respective halls when the necessity for debating and determining questions supervened upon the Count. Again, their mutual relationship as organized branches of the Legislature prevented hopelessly their united performance of the function; therefore in deciding separately, if one House differed with the other, the vote was not enumerated, and the State lost her representation, because a party majority happened to be opposed to it. If majorities happened to be the other way the vote was counted, though it were never so clearly and constitutionally void.

Utter confusion and disorder have often followed this mode of Counting, as they always must where practice violates the spirit of the law. Political parties would adopt such rules and use such customs to defeat the opposition, and when their own weapons were opposed victoriously to them, they knew that they were cheated and became rebellious. In 1869 the nation was thus disgraced by the unparliamentary scenes enacted at the execution of their own concurrent resolution prescribing the method of reporting Georgia's votes, and in 1877 the result was still more disgraceful when the House solemnly repudiated the President "counted in" by a law which they themselves had framed.†

The people of the country have, however, the satisfaction, if a poor one, of knowing that it is not the execution of their Constitution, but

* Chapter ix., "Organization of the Houses."

† Appendix, "Annals of Congress," 1869 and 1877.

its violation, which converts the proceedings of the Legislature into bear-baiting exhibitions.

Canvassing has always been regarded as a necessary function in determining elections; it was in regular use during the Confederation, and it was provided for in some of the original State Constitutions, whence the Fathers drew suggestions freely.* Therefore, had it been designed that it should ensue at this stage of the proceedings, unquestionably the term would have been used. On the contrary the single duty is declared to be Counting, which has always and everywhere, but here, been held to be a Computation.

The early practices of Congress, instituted by concurrent resolution in 1793, were clearly indicative of their comprehension of the provision's direct and simple meaning.† They appointed tellers "to make lists of the votes, as they were declared" by the Vice President, who subsequently summed them up as the "count," which was incumbent on them. There is no possible stretch of imagination, which can compass any larger powers of Congress in their custom at that time.

The ancient English records use the word "*tallier*," whose business it was to keep a tally of any numbers *given him* by "notching" them on a stick, for purposes of subsequent *computation*. In a Presidential election the tellers formerly took lists, which were "compared" or tallied, and, being found correct, were handed back to the President of the Senate, who announced the result thus ascertained (made certain) and witnessed. In modern times tellers are used extensively in political and other conventions, where their duty is to take the votes as they are given and tally them, and where they have no further function than that of clerks. Bank "receiving tellers" are expected to count only the good money passed in to them, which is an extra service imposed on them by the invention of counterfeit currency, both they and "paying tellers" being instituted primarily to count the funds correctly. In the proceedings of Congress the function of the tellers has never been to discriminate the quality of votes,—over that the two Houses claim authority,—but to enumerate, compare and compute them. When therefore Congress first appointed tellers, they reaffirmed

* Appendix, "Constitution of Maryland," New York and Pennsylvania.

† Appendix, "Annals of Congress," 1793.

the strict provision of the law to be, that "the votes shall then be enumerated and computed,"—that is, the votes which the President of the Senate had "declared."

The expression has frequently been used in this connection, that Congress can "order" a rejection or a count of votes; and the idea follows necessarily from the right, which they find in this clause, to canvass them. Thereby they ignore the direct and forcible command, the votes "*shall* then be counted."* It is useless to advance the theory that that refers only to the "legal votes," for the Constitution has declared that the Certificates shall evidence their legality, and the forced conclusion violates the spirit of the clause.

Had a specific provision been made for a Canvass by Congress, the Constitution must even then have next directed, "and the votes shall then be counted," for the Computation must necessarily succeed the Canvass. In that event party policy could and would have found no doubt or difficulty in the clause, and it should not be sought there now.

Congress may legitimately define what shall be a vote, but that does not extend to canvaassing it. To urge the latter is to accord the right of vetoing a State's representation,† which in turn becomes an active participation in the election. There is thus established a third way of electing a President, which is certainly not the intent of the Constitution; and that such a third method is probable, as well as possible, is evidenced by its actual employment in 1877, when Congress practically annulled the wishes of the States.

In the whole range of the Electoral System, the only part which the Constitution has declared shall fall to Congress is in the event that the Electors fail to make an election, and then the duty in the premises is carefully divided between the two Houses.‡ Their express and definite duty in this case is a bar to any claim of authority by less definite provision.

In fine there are numerous reasons, both intrinsic and extrinsic, why Counting does not cover the right of Canvassing; and it is assumed, not because it is the direction of the Constitution, but because it is the desire of their untoward hearts to usurp prerogative and to control the election of Presidents.

* Chapter iii., page 64.

† Chapter iii., page 50.

‡ Chapter ix., "Election by the Houses."

To what end? Charles Pinckney answered the inquiry in 1800,* and his memorable words will be graven deeply on the historic page of this nation, beginning March 4, 1877:

"Instead of having a really independent Executive, whose election, in order that he may be firm in the exercise of his revisionary power and honest in the disposition of public honors, was not to be subject to the control or interference of Congress; one, who could really be called 'the man of the people,' and on whom they could depend; you will have a fettered, dependent creature of the Legislature, the production of the little packed Committee, a thing with a chain on his pen and a curb in his mouth, who can neither write, speak, nor sign his name but at the will of his creator."

That prophecy was inspiration! When a man sells his soul, the Devil owns him,—when he sells his liberty for office, his buyer is his master,—and the President seated by the "Electoral Commission" will be a slave, unless he becomes a renegade.

COUNTING IS COMPUTATION.

It is advisable now to make a more direct examination of the phrase, in order to ascertain its constitutional import.

It has been shown that the Electoral Votes are to be declared by the President of the Senate, and it follows that nothing now remains but to compute them and publish the majority. These votes must have recognition by Congress and the country in completing the election, and it would naturally be advisable that the largest publicity should be given to the result, and at the earliest time possible. The Constitution has therefore coupled the Opening and Counting of the Votes together, as two acts to be accomplished simultaneously;† and we have seen that the general tenor of the System was that all popular and political excitement might be avoided.‡

The method, which it was determined should be pursued, involved their opening and counting on one and the same day; only thus can excitement and intrigue be kept in the necessary abeyance, and the circumstances in 1801 and 1877 demonstrate it. As the provision is framed, it requires a law to execute it properly.§ In the Act of 1792

* Appendix, "Pinckney's Speech."

† Chapter xi., "Amendment and Acceptance."

‡ Chapter ii., page 28.

§ Chap. xiv., "A New Law," sec. v., 11.

Congress recognized this, and selected the second Wednesday in February as the one and only day; on which day, and not on any other, Congress are required to be present and participate as Witnesses.*

In the phrase itself is used the word "then," in reference to the time of Counting, to which no construction can be given but that of the lexicographers, who define it "at that time." The Certificates are to be opened and the Votes are to be counted *at the same time*; "then" has a direct reference to the former act, and requires that the Computation shall be concurrent.†

For this reason the Fathers directed the tellers‡ "to make a list of the votes *as they shall be declared*,"—to cut the notches as the votes were given them; and it is thus proven conclusively that the understanding of the authors of the Constitution was, that the two transactions should be executed at one and the same time.

But a formal declaration of the result was manifestly requisite as well. Whatever private tallies the members might have kept during the proceedings, that would not be the ceremonious proclamation which the importance of the result demanded. Furthermore, the President of the Senate had practically determined the election, by declaring all the legal votes; any further publication or proclamation of it was a mere, though an eminently proper, formality.

And their formal Witnessing of it was necessary also, as an affair of State, for which the Constitution had required their presence.§ Therefore the tellers were required to sum up the votes upon their lists, in completion of the act of witnessing; and when that result was formally proclaimed by the President of the Senate, it was to be "deemed a declaration of the persons elected President and Vice President."

THE HOUSES COUNT AS WITNESSES.

It is thus apparent that the custom then instituted and deemed to be a constitutional Counting of the Votes, so far as Congress were to take any part in it, was a continuation and completion of their Witnessing. They counted, or, as Charles Pinckney puts it, "counted over" the votes, as a necessary part of their duty.

* Chapter xii., "The Law of 1792."

† Chapter xi., "Amendment and Acceptance."

‡ Appendix, "Annals of Congress," 1793.

§ Chapter ix., "Election by the Houses."

In confirmation of this it will be shown hereafter, that the clause, "in the presence of," etc., was originally placed at the end of the provision.* Therefore it was and is designed to mean that "the President of the Senate shall open the certificates, and the votes shall then be counted, in the presence of the Senate and House of Representatives."

Again, the introduction of the Congress as Witnesses, and the absolute silence of the Constitution as to any other duty they were "at that time" to perform, preclude the belief that any other duty was provided for them.† The two official transactions are placed so closely together, and are so limited also by the spirit of the System to the same point of time, that we may be sure the modifying phrase introducing Congress was designed to cover both of them.

On the contrary, if the Fathers had designed to invest Congress with the power of officially counting, it would have been most natural for them to have so stated. We recognize the devolution of the various powers as very exact, as was necessary in framing an organic law; and it is entirely inconsistent with either the purpose or the practice of the Framers to neglect exactness at the consummation of this carefully considered System. To have clothed Congress with the right to count, it would have been only necessary to have added the two words "by them"; and yet they saw fit, and with much deliberation, not to use these words.

The reason that they did not use them is clearly this: that such an investiture would inevitably have made Congress the Official Computors of the votes; and the Framers well foreknew that the power would be seized upon by them as a pretext for interfering with elections. A formal Count and Declaration of the result were advisable, but to grant it to Congress would have given them the opportunity to determine the President-elect in defiance of the votes.‡

If the President of the Senate had been empowered only to disclose the legal Votes, and Congress to declare the legal Count, it would have introduced a startling complication into the Electoral System; and the Count would necessarily have had precedence in determining the election, as being the last and crowning act of the proceedings. Such a *finale* would, at one fell swoop, have overturned the entire System; all

* Chapter xi., "Amendment and Acceptance."

† Chapter x., "Massachusetts."

‡ Chapter x., "Pennsylvania."

their safeguards, all their care and anxious divestiture of its several parts from Congress, would have been in vain ; its conclusion would have defeated all their plans, and nullified the pure and good results which hitherto had been accomplished.

We know very well at this day of what Congress are capable in counting the votes ; and it is impossible that the sagacious Framers of the Constitution could have stultified themselves by such a total abnegation of their principles. We need no stronger argument than this, for it goes to the very root of the Electoral System ; and that System has most positively prohibited, from first to last, Congressional interposition in a Presidential Election.*

THE VICE PRESIDENT COUNTS OFFICIALLY.

As it has been demonstrated that Congress is not empowered to officially count the votes, so it may be proven that the right is vested in the President of the Senate.

It needs very little consideration to see that Counting is not "an affirmative act," as it has very recently been discovered to be ; this is the last phase of sophistry presented by Congressional research into the abysses of the simple phrase. There is no longer anything to affirm, for the legal votes have been declared. The President-elect does not constitutionally require an affirmation, further than that made by the Votes, for it is in fact the electoral votes which declare him President ; "the person having the greatest number of votes shall be President," is the brief and specific language of the law.

The votes being disclosed, they require the simple arithmetical process of Computation, prior to the official declaration of the President-elect. That is the business of a clerk, and falls within the same category as breaking the seals of the lists ; it may be customary for the President of the Senate to compute the votes, but it must be only as a means to the execution of some higher duty.

The Counting of the Votes is manifestly intended to conserve one purpose, and that is the publication of the greatest number of votes for one person. Some one must perform this duty officially, because it is the conclusion of the entire process of electing a President. It has been seen that it was deemed imprudent to vest the power in the two

* Chapter ii., page 28.

Houses, and there then remains only the President of the Senate who can do it.*

The President of the Senate has been set apart to perform high official duties upon this occasion, and is eminently fitted for the trust. It is reasonable therefore that he complete the work.† For him to count the votes is simply to enumerate and compute them, and the result must of course correspond with his former statements; the danger of a fraudulent Count has passed with the disclosure of the votes. Therefore the Senate and the House are still retained as Witnesses, and themselves sum up the votes in order to make certain of his pending announcement, whose issue is a declaration, by the votes, of the President-elect.

The early custom, sanctioned by the law of 1792, was for him to read over one of the lists prepared by the three tellers,‡ which he necessarily examined and officially accepted, and which included the sum or result of all the votes for all the candidates. That result declared the person elected, according to the Constitution, and it was his official Count of the votes. By concurrent resolution he was further empowered to announce the future President by name and formally, which was a very proper and legitimate conclusion of the business.

It has been alleged that the concurrent resolution referred to specifically commanded the President of the Senate to "announce the result," and that Congress thus affirmed their right to count the votes. The fact is true, but the conclusion utterly erroneous. The resolution clearly shows that its object was to provide a mode of "examining and comparing" the certificates and votes, as "read and declared" by him, in prosecution of their duty as Witnesses to the correctness of the transaction. The meeting of two independent Houses requires an agreement to make it harmonious, and Congress, in this instance, were not at all affirming their prerogatives, but devising a plan in execution of their concurrent duties as witnesses. A concurrent resolution cannot prescribe the duty of any officer or branch of the Government; that must be done by a law.

It has been objected that the Framers would have inserted in the

* Chapter x., "Massachusetts and Pennsylvania."

† Chapter x., "Vermont."

‡ Appendix, "Annals of Congress," 1793, *et sequitur.*

phrase the words "by him," if they had intended the President of the Senate to count; but that is not a reasonable deduction. If the clause had seemed to vest the power in him, when it was designed to invest Congress with it, it is reasonable that they should have inserted "by them," which would establish its significance. But when the official Counting by him was so clearly stated, so necessary in completion of his other duties, so certainly to be done at the same time, so manifestly in the presence of these witnesses, and so surely not to be performed by Congress in subversion of the entire System; when he had been so specially selected to execute the high trust of an official and complete production of the votes, and when obviously that could only end in summing up the result; and when, as will be yet more amply shown, the original construction of the clause specifically invested him with the official duty of counting, which was not abrogated by the after-change of phraseology; it is patent that the necessity of such further definition of the proper agent would not suggest itself, nor even be required.

Nevertheless, it was particularly stated in Article XXIII. of the draft of the Constitution, adopted by the Federal Convention, which subsequently went down to all the State conventions in the form of a Resolution, and was ratified by the nation together with the Constitution.* That Resolution confirms all our previous arguments in developing the true Electoral System, and authoritatively declares the function of the President of the Senate to be the complete trust of "Receiving, Opening, and Counting the votes."

OPINIONS OF LAWYER-STATESMEN.

In concluding our analysis of this branch of the Electoral System, it is well to glance at the opinions of certain eminent men, who have especially discussed the Counting of the Votes, and who are freely quoted on the Congressional side of the disputed question.

Time and again during the debates of the last twenty years on this topic, the sayings and votes of distinguished statesmen and lawyers, who were also members of Congress, have been instanced in support of the doctrine of the Constitutional right of Congress to count the votes—that is, to canvass them. Passing by the fact that there is a long array of eminent authorities on the other side, it is obviously unfair to

* Chapter xi., "The Resolution of 1787."

beg the question, by adducing the views of Congressmen in sustentation of the claims of Congressmen. There is no apter illustration of the prevalent opinion, that it is the business of a lawyer to support his client's case, than the proceedings recorded in the "Annals" in relation to the electoral question. These professional gentlemen entered Congress, not as lawyers, but as politicians, affiliated with one of the great parties of the country, to whose interest they gave all the benefit of their trained intellects; and the only evidence which can rationally be educed from their announced positions is as to the views of their respective parties at the time, of which they were the principal exponents.

Consequently, when there has been a change in party policy, we not infrequently find them arrayed against themselves, and combating with shrewd skill and more substantial votes the very positions which circumstances had once induced them to defend. A most interesting and instructive exposition of the "true inwardness" of Congressional opinion might readily be framed by a simple comparison of the expressed views of members on this question then and now.

The facts of the recent Presidential election furnish an excellent illustration of this "policy" of leading statesmen and lawyers, which is fresh in memory. In the entire range of the momentous discussion in the two Houses, in the arguments of counsel before the "Commission," in the decisions of the lawyers and the judges of the Supreme Court constituting the "Commission," and in the ultimate determination of the various questions by the votes of Congress, party lines divided them exactly and conspicuously. Thus it has always been, and doubtless always will be, while party interests are permitted to elect our national Executive.

Furthermore, if there is one subject connected with the Constitution of which Congress have shown themselves more profoundly ignorant than of any other, it is the Electoral System. By this it is not meant that they are ignorant of the fundamental principles of the System, when they claim the right of a general canvass of the votes, though that is true; but the assertion is made that in the exercise of their incumbent duties pertaining to the canvass, in the legislation which has from time to time been instituted to transact an election, in their discussions of the proper ways and means, and in their declarations of the simplest principles and most ordinary details of the Constitution

and the laws enforcing it, they have so often proven their deficiency of practical knowledge, and their neglect of a reasonable examination of the subject, that it is not too much to say that the records of their transactions in this regard exhibit a series of almost unparalleled stupidities and blunderings. This conclusion is reached by a minute inspection of the "Annals" containing the acts and debates of Congress on the electoral question from the beginning, and proof of it is scattered freely through this treatise.

This fact argues not to their incapacity, but to their indifference, to acquaint themselves with the merits of these momentous issues, concerning which the nation is wiser far to-day than it ever was. It is too much to expect that they will candidly acknowledge it, but there are a few recorded instances where frankness triumphed over pride, and where the disposition to do right corrected the earlier predilection.

An example of this kind occurred in 1857,* when the President of the Senate, *pro tem.*, had affirmed his right to count the votes, and did count the disputed votes of Wisconsin, in the face of protest, and declare the President-elect. He withdrew with the Senate from the House in the midst of a disgraceful uproar and confusion, and the two branches of Congress immediately addressed themselves to a stormy debate of the mooted question, whether he or they had a constitutional right to count the votes. It is the only time in our political history that this question has been specifically and impartially canvassed, and by an almost unequalled array of learned and able statesmen, and it resulted in a vindication of the action of the President of the Senate.

In the meeting of the Houses, Stephen A. Douglas, than whom perhaps a more capable and honest man never sat in Congress, hastily arose and emphatically protested against a declaration of the result by the President of the Senate, using, among others, the following words:

"I do protest solemnly against the deed being done before we have had an opportunity of deciding this (the Wisconsin) question."

The Houses were at that time acting under the concurrent resolution established by the Fathers in 1793,† which Mr. Douglas had evidently

* Appendix, "Annals of Congress," 1857.

† Chapter xiii., "1793."

never examined, and of which he had but a general and indefinite conception, as he obviously was also not conversant with the Constitution and the Act of 1792, when he made his solemn protest. For subsequently in the Senate he used the following language in confession of his ignorance, and in frank recession from his former attitude :

"On looking into the law and the Constitution since we have returned to our chamber, I have arrived at the conclusion that all has been done that the law requires to be done to make the action complete."

Throughout the "Annals of Congress" ample evidences of the uncertainty and unreliability of Congressional opinions may be readily found, and their value is therefore *nil* in so far as they are offered as authority upon the electoral question.

The constitutional system of electing a President, as developed thus far in this disquisition, harmonizes and reconciles every conflicting opinion or desire which has ever been maintained. They who desire State elections examined and fraudulent certificates disallowed have their remedy in the courts ; they who wish to canvass the votes of the Electors may exercise the power by providing the specific mode in which it shall be done ; they who covet the counting of the votes may count them ; they who feel the necessity of a Congressional determination of these provisions may devise the legislation necessary to make it ; and they who realize that the President of the Senate is the national agent to produce the legal votes and proclaim the ultimate result may have the satisfaction of seeing him execute the function. If the Constitution had prescribed no method of receiving, opening, and counting the votes of the Electors, a more efficient plan could not be devised than that adopted ninety years ago by our forefathers.

KENT, STORY, AND MARSHALL.

There are three opinions often referred to which are worthy of a brief examination, because at least two of them are not the products of either private interest or partisan policy, because they emanate from judicial minds of the highest order, and because they are regarded as semi-judicial opinions on this subject.

Chancellor James Kent, in his Commentaries, remarks as follows :

"The Constitution does not expressly declare by whom the votes are to be counted. In the case of questionable votes and a closely

contested election, this power may be all important; and, I presume, in the absence of all legislative provision on the subject, that the President of the Senate counts the votes and determines the result; and that the Houses are present only as spectators, to witness the fairness and accuracy of the transaction, and to act only if no choice be made by the Electors."

It is directly apparent that this exposition is not offered as definitive, but simply as the strongest impression produced by a cursory examination of the provision; and it is to be regretted that, since Kent expressed an opinion, it is not a carefully considered one. The reason that he did not is, however, obvious. He was not making an exhaustive inquiry into the Constitution, but simply touching on its salient points as they presented themselves in an epitomized review. The subject had, however, been mooted at that time, and therefore called him aside from the general tenor of his comments to deliver an opinion on it. His evident intention at the outset is to present a definite judgment, but a single idea presents itself in opposition, which he therefore frankly gives, and, not desiring to exactly weigh its force, he adds the doubtful "I presume."

About the year 1821, the theory had been advanced in Congress that there is a *casus omissus* in the provision. It is therefore Kent's intention to disclaim that belief, and to assert that there is a definite provision covering it.

He obviously sees the clear duty which is laid on Congress, and makes no qualification of their business to be, throughout, a witnessing of the fairness of the canvass. He sees the strong presumption in favor of the lodgment of that function with the President of the Senate, and expresses it most positively. But he observes, further, what is patent to the most superficial examination, that the provision is expressly framed that Congress may subsequently legislate upon it; and, without ascertaining how far that legislation may go, he hastily injects the thought into the judgment, and leaves it thus in its unfinished state. Had he taken one step more he must have perceived that, if the power be "all important," it must be vested absolutely in the President of the Senate, subject to a legislative prescription of its mode of execution only. These are the facts as we have seen, and Kent's clearer insight just escaped developing them. From what he had already stated to be the basal principle of the system, which

has heretofore been quoted,* viz., That Congress is excluded from all participation in a Presidential election, it is obvious that, had he reflected but a moment longer, his judgment must have been recorded against their interference here, and in final favor of what was already with him so strong a presumption.

There are three facts to be gathered from inspecting this comment, viz., 1, he believed that no *casus omissus* existed; 2, his judgment leaned towards the devolution of the official power upon the President of the Senate; and 3, he recognized the necessity of legislation.

Justice Joseph Story, who wrote an almost exhaustive treatise on the Constitution, at Sec. 1464, remarks as follows:

"In the original plan, as well as in the amendments, no provision is made for the discussion or decision of any questions which may arise as to the regularity of the returns of the electoral votes, or the right persons who gave the votes, or the manner or circumstances in which they ought to be counted."

"It seems to have been taken for granted that no questions could ever arise on the subject, and that nothing more was necessary than to open the certificates which were produced, in the presence of both Houses, and to count the names and numbers as returned. Yet it is very easy to be conceived, that very delicate and interesting questions may occur, fit to be debated and decided by some deliberative body."

This passage has invariably been invoked to strengthen the Congressional claim to canvass the votes, and as showing Story's opinion that there was a *casus omissus* here, by his reference to it in the next paragraph as a "defect." On the contrary it was manifestly written with no such purpose, as an analysis of it will demonstrate, and it expresses an opinion decidedly opposite to that alleged.

The three questions unprovided for are,—1, "the regularity of the 'returns' of the electoral votes"; that is, their identification as the votes of a State; 2, "the right persons who gave the votes"; that is, their identification as the appointed Electors; and 3, "the manner or circumstances in which they ought to be counted." A distinction is thus made between the Votes and the Lists. It is a fact that these three points are not covered by the Constitution, and, in our discussion of them heretofore, it has been shown that, as they were questions of

* Chapter ii., page 32.

policy, and subject to modification from time to time, they were left to investigation and decision by Congress, and to the legislation which might be deemed advisable. In view of the fact that Congress have never legislated but upon the second of these points, and that, on the other hand, they have assumed the power of special and partisan decision as the other points arise, it would have been a happy thing if the Constitution had provided for them. But, because the Legislature have neglected their plain duty, therefore it is not proper to hold the framers of the Constitution responsible. Justice Story is entitled to his opinion, and is excusable if he believed that the action of the Fathers was a mistaken one; but it would seem that these latter are, at least, equally entitled to presume, when they had laid down a general provision which required the intervention of a law to execute it, that Congress would perform their duty and provide one.

The Constitution has provided an ample authentication by themselves of the votes of the Electors, and has designated the official who shall receive, open, and count them; but it has not declared how the State returns shall be identified as regular, nor how the Electors shall be identified as regular, nor the mode and manner of opening and counting the votes. These three points have been heretofore shown to be legitimate subjects of settlement by a well-defined law. As to Congress, they have never legislated upon the first, but have several times quarrelled over it without any settlement; as to the second, the Act of 1792 declares that the Electors shall be identified by the Governor's certificate; and, as to the last point, Congress passed concurrent resolutions which obtained until 1865, and then enacted the 22d Joint Rule, which lasted them until party policy required a different one in 1877. Judge Story was doubtless wise in anticipating difficulties from "the tendency of the legislative authority to absorb every other," which he had just been discussing;* but were the Fathers unwise in expecting Congress to perform their bounden duty, or in believing that the people of the country would demand it of them? No Constitutional provision can prevent deliberate usurpations, when the constituents of the Legislature uphold them in it.

Let it be observed that Justice Story makes no claim of a defect in the devolution of any power pertaining to the transaction of a Presi-

* Chapter ii., page 33.

dential election ; he confines his opinion solely to certain questions of mode and manner, and to the impolicy of their omission from the text. He has been already quoted as standing by the side of Kent in affirming the prohibition of Congressional interference with the electoral returns, and has no intention in this instance of stultifying himself.

On the contrary, as to the *power* of counting the electoral votes, he records his opinion to be that the President of the Senate is invested with it, by coupling Opening and Counting together as being executed by the same official in the presence of the Houses. If it be deemed that this is not his meaning, then his own specific language, Sec. 1452, may be quoted to demonstrate it :

"The votes, when given, are to be transmitted to the seat of the national government, and then *opened and counted* in the presence of both Houses."

John Marshall, afterwards Chief Justice of the United States, is quoted as rendering an opinion, which is frequently advanced in support of a Congressional right of canvass. When the Electoral Bill of 1800 was before the House, he took a leading part in amending it, and the following record appears in the Annals :

"April 16, Mr. Marshall, after speaking of the importance of the subject before the committee, and the necessity of some salutary mode being adopted for this object, expressed his doubts of the propriety of two points in the first section of the Bill," etc.

With his aid and that of other unpartisan members of the House, the Bill was so amended that its grossest and most obnoxious features were obliterated, and that it became practically valueless to the Senate leaders ; it was therefore abandoned.*

As to Marshall's action here, it is clear that, firstly, he supported his party, the Federalists, in carrying a measure of party policy, which he knew it would be impossible to resist effectually ; but, secondly, he strenuously opposed a judgment of the votes of the Electors in the partisan manner proposed, and carried his point. As to the former, as a member of a party, it is expected that he would do so ; as to the latter, we respect the honor of the man. There is, however, no significance to be attached to his actions, as indicating his unbiased opinions, as to who might lawfully count the votes.

* Chapter xi., and Appendix, "The Bill of 1800."

His opinion as to the propriety of *some* kind of a law was expressed, but what that law should be does not transpire, either from the citation or from the amendment afterwards introduced. There was no issue as to who should count the votes, and not one of the debates discusses that specific point. The question was,—Can the people of Pennsylvania lawfully choose Electors without the direction of their Legislature, and, if they do, can Congress declare them illegal?—a novel question at that day, and one on which the result of the pending election was supposed to hang. John Marshall thought that the subject was an important one, and that some salutary mode ought to be adopted for its disposition;—and that is as far as he goes, unless his acts be taken into consideration. Now, it is admitted by all statesmen that some salutary mode, some comprehensive law, should be framed to cover this and all such questions arising under the Electoral System; but it is equally well known that the acts of a member of Congress, voting with his party, are no criterion of his private opinions. Consequently, neither Mr. Marshall's language, nor his votes, on this occasion are available in determining his candid judgment as to who might lawfully count the votes.

On the other hand, we have the positive statement of Thomas Jefferson, that John Marshall regarded the whole Bill as unconstitutional, made in a letter of April 30, to Edward Livingston, from which is extracted the following paragraph, showing Marshall's action to have been a dexterous manœuvre to weaken the force of an unlawful Bill, which he could not crush:

"The Bill for the election of President and Vice President has undergone much revolution. Marshall made a dexterous manœuvre; he declared against the constitutionality of the Senate's Bill, and proposed that the right of decision of their Grand Committee should be controllable by the concurrent votes of the two Houses of Congress; but to stand good if not rejected by a concurrent vote."

Additional evidence of this appears in the Philadelphia "Aurora" of April 22, 1800, which says:

"The conduct of General Marshall in the House of Representatives was canvassed at this caucus (of the Federalists), and a member from Massachusetts declared that Marshall had done more harm by his pretended amendment of the Bill than any one else."

And, finally, there is a statement made by John Marshall himself.

whereby he, in the character of an historian, declares his knowledge of who did count the votes in those days, which is even more valuable than his opinion would have been, for it demonstrates the earliest practices under the Constitution. It appears in Chapter Second of his celebrated "Life of Washington," and, though brief, is directly to the point, as follows:

"In February the votes for the first and second magistrates of the Union were *opened and counted* in the presence of both the Houses."

CHAPTER IX.

CONGRESS AND THE ELECTION.

"Towards the preservation of your government, it is requisite that you resist with care the spirit of innovation upon its principles, however specious the pretexts."—GEORGE WASHINGTON.

THE FUNCTION OF CONGRESS.

IN relation to the assumed right of an affirmative, legal or official Count by Congress, there are certain causes inherent in the constitution and function of the two Houses, which do and always must exclude them from its exercise, and which demonstrate the logical necessity of the plan heretofore set forth.

The opening clause of the Constitution defines their function in the provision, "All legislative powers herein granted shall be vested in a Congress of the United States." This grant not only imports the exclusive right of legislation, together with ample power in executing it, but it imposes the paramount duty upon Congress to make laws wherever they are requisite; and it goes farther still, for it is an express limitation on them, and, constituting them a Legislature, requires that all their powers and duties lie in legislation, and forbids their acting but by legislation.

The abstract necessity of this limitation is so obvious as to require no discussion, further than pointing out its virtue in a Republic such as this. The executive, judicial, and legislative branches into which the Government is divided must be independent, and each branch must be supreme within the bounds of its own department. The Constitution is the general guide for each of them, but the Legislature is empowered to make all laws necessary in executing it. Having thus the prescriptive right to declare what shall be an execution of the Constitution, were they not limited to the expression of that declaration by a law, their *ipse dixit* would invade the sacred precincts

of the co-existent powers, and demolish the organic principle of the Government. With full knowledge of this limitation, Congress do not pass concurrent resolutions demanding this or that of the President or of the Supreme Court; but, when they propose to define or limit the powers or duties of these departments, they enact a law in the regular and constitutional manner.

So definite was this conception in the minds of the Framers, that, in certain cases, when it was even reasonable that Congress should not be compelled to make a formal law, they yet felt the necessity of specially empowering them with other privileges. Therefore they expressly grant to each House the power of making the rules of their own proceedings, of adjourning, of judging the election of and governing their members, and of concurrence by the Senate in nominations to offices of the Government; which otherwise, under an exact construction of the Constitution, must have been done by the awkward method of a statute, signed by the President. And these are the only cases of a departure, except in the matter of impeachment and the secondary election, from the principle that the powers of Congress must be exercised by legislation.

The principle is also carried minutely into every definition of their authority, in its multifarious specifications. In the eighteen clauses of Sec. VIII. Art. I., where specific grants of power are mentioned, it is declared that Congress shall "make all the laws necessary in carrying into execution the foregoing powers"; they may change their time of meeting "by law," they may provide a President in case of vacancy "by law," they shall establish all offices not provided for "by law," they may prescribe the proof of State acts and records "by general laws," they shall regulate the property and territory of the United States "by rules"; in determining the time of choosing Electors, and the day on which the votes shall be cast, they must enact a law, and in fixing the times of choosing Representatives, although members of one branch of Congress, it must be done "by law." The re-announcement of this fundamental principle of a Legislature only intensifies the meaning of the Constitution, and evades any possible misinterpretation of the function of the Congress.

Neither can there be any doubt of the definition of a "law of the United States." The power of legislation is vested in both Houses as co-ordinate branches of Congress, organized separately by their own

rules, and must therefore be joined in by both; and the process by which such joint resolution may become a law is fixed in Art. I. Sec. VII., as follows:

"Every order, resolution, or vote, to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment), shall be presented to the President of the United States, and, before the same shall take effect, shall be approved by him."

Let us apply this principle and this express definition to Congress in their relation to the votes of the Electors.

The Electoral System is perfect in its prescription of all the processes requisite in electing a President. It starts with a State appointment, proceeds to the voting of the Electors, and the reception and disclosure of the legal votes in the presence of the Houses, and ends with a declaration of the result. As has been shown,* the only part which the United States can take in the transaction, is the reception and disclosure of the legal votes, and the declaration of the result; and it follows, that the only means by which Congress can perform their duty in the premises, is the enactment of a law to regulate such reception, disclosure, and declaration. Every question which enters into the determination or execution of these three transactions must be duly prescribed by that law, and Congress can devise no other means which is not in conflict with the Constitution.

The question, whether the two Houses have or have not the power of canvassing the votes, does not affect the necessity for legislation; that is imperative in either event, as being the fundamental principle of their action. Conceding, then, for the moment, that the right of canvassing is in Congress, they are compelled, from the very nature of their function, to execute it by a general law,—not by a special law, if the spirit of the Constitution is to be recognized.

Let us suppose that they set about enacting such a law, in furtherance of their assumed power, to what result must it inevitably lead them?

Its provisions must be framed in execution of the Constitution, and the regulations provided for the reception, disclosure, and computation of the legal votes must tend only to their identification. What shall be a legal vote is carefully and minutely defined in the Electoral System,

* Chapter iii., page 51.

and their law therefore must comply with that definition, and be only in this respect a re-enactment of the organic law. Now, who shall execute the general law? Congress cannot execute it, for they may only legislate; they cannot appoint one or more of their own members as agents, for the parts cannot be greater than the whole. They must then from sheer necessity appoint an official person, or official body, whose duty it shall be to execute their law; and they most probably would also provide, in so extraordinary a case, that he should execute it in their presence, so that they might be assured of fairness and correctness, and advised at once, in case of no electoral election, of the necessity of election by themselves.

This is no fanciful exposition of the mode in which the Houses must canvass, but an obvious and reasonable necessity, and illustrated by their recent constitution of a "Commission" to execute the duty for them. But this leads them to the exact position that they already occupy under the Electoral System, except only as to this: that, whereas Congress would then appoint a permanent official agent, or mistakenly permit the various administrations to appoint him, the Constitution has at the outset adopted the much better plan of designating the Vice President, whose power is independent of any lower authority, and therefore so much the more likely to be fairly and conscientiously executed.

ORGANIZATION OF THE HOUSES.

On the other hand, it very clearly follows from these considerations, that the Houses cannot rationally canvass by a *viva voce* vote.

Since the year 1821 the custom has obtained, when questions have arisen requiring settlement, of arbitrarily deciding them. Time and again it has been proposed by their discreet and law-abiding members, that general statutes should be enacted providing for these mooted points;* but it has been their habit in the earlier half of this period to pass them by for future legislation, and their policy more recently to pronounce their *fiat* for the sake of party ends. The result is, that there has been not only a general violation of the fundamental law of Legislative being, but various policies have obtained at various times, producing discord and disagreement in the records.

* Appendix, "Annals of Congress," 1857.

In 1821, the votes of Missouri were by resolution neither counted, nor rejected, in contravention of the express command, "the votes *shall* be counted"; in 1857, it was moved to treat Wisconsin's votes in the same manner, but refused; in 1837, the same rule, not law, was adopted touching Michigan, and was peaceably executed; and in 1869, it was adopted in the case of Georgia, and executed under violent protest. In 1837, a number of incompetent Electors were discovered, and a resolution passed that their votes were void, but they were nevertheless counted; in 1877, this ineligibility was investigated in one case, decided immaterial in another, and determined arbitrarily in several others. In 1857, Wisconsin's votes, though cast after the appointed day, were counted by a "resolution" of the President of the Senate alone; and in 1869, Georgia's votes, though cast after the appointed day, were accepted by concurrent resolution of the Houses.

In 1865, the votes of Louisiana and Tennessee were rejected by special Act, because there had been violence and intimidation there; in 1877, the votes of Louisiana, Florida, and South Carolina, cast for the Republican candidate, were accepted by the Electoral Law, because there had been violence and intimidation there. In 1865, a permanent Joint Rule was established, used in 1869 and 1873, and replaced by temporary Act in 1877, and now there is neither rule nor law to govern them. By the 22d Joint Rule no debate on questions was in order, and by the Act of 1877 they were sent to a "Commission" to be argued by the finest legal talent in the land. In 1857, the President of the Senate declared his right to count, Congress objected, he counted, Congress protested, he receded from his position, and then it was discovered that he had but executed their resolution.

Under the 22d Joint Rule of 1865, it required the consent of both Houses to *admit* a vote objected to; under the Act of 1877 the concurrence of both Houses was made requisite to *reject* it; and the vote, whether valid or invalid, thus became a foot-ball to be kicked in or out of bounds by the stronger party. Under that Rule, in the year of its establishment, the votes of West Virginia were excepted to as illegal, but the exception was not entertained, because it was not made "upon the reading of the certificate"; as if an unconstitutional vote were made constitutional by the momentary forgetfulness of the objector, or the shrewd interposition of some other business; and an illegal vote

was thus counted legally when it was read, provided no objection was made to it.

When the Houses have sat as witnesses, their proceedings have always been confined to computation,—in sharp contrast with their definition of the act as an “affirmative” one,—and they have retired to their respective quarters to vote on mooted questions. In 1873, when by a joint vote they refused to count the votes of Georgia cast for Horace Greeley, their action was an interpretation and definition of a general provision of the Constitution, and in so far an act of legislation; but the resolution never had the signature of the President, and was not a law. In 1865, the votes of Louisiana were excluded by a law, signed duly by the President; but in 1873 her votes were again excluded by a rule of the two Houses, which was not a law. In 1865, under the above law, the votes of Arkansas were rejected; in 1873, under the Joint Rule, they were again excluded by the will of the Senate alone. These are all acts of legislation, the only acts which Congress can perform, in their so-called execution of the Constitution; but not one of them was transacted constitutionally, owing to this insatiable desire to canvass for partisan ends.

These are the precedents which the want of legislation has provided for the future Legislatures of the country. Is it possible that thus the Fathers expected their carefully wrought-out scheme to have its execution? And is it not obvious that the disorder and frauds, which have crept into it, owe their sole origin to this unhallowed exercise by Congress of an arbitrary canvass?

A canvass, which is to be performed by two co-equal persons, or two organized and independent bodies, is an absurdity. The will or wish of one must always counteract that of the other, and the result is that the more powerful and not the just canvasser triumphs. When it concerns the canvass of the votes of the Electors, and the two Houses undertake it, perhaps with positively divided counsels, as in 1877, the situation is a perilous one for the nation; if it escape anarchy and revolution, it is “with the skin of its teeth.”

The custom of retiring to debate or vote on an objection raised to the reception of a vote is a most pernicious one, but necessarily follows the attempt to canvass by co-ordinate bodies. Frivolous objections may be interjected at every step of the proceedings, to the delay or ultimate defeat of the constitutional requirements.

In strong contrast with the irregular proceedings of their late successors, let us observe the practice of the Congress of the Fathers of the Constitution.

In 1792, in anticipation of the ensuing Presidential election, they framed an electoral law extending to all the details of the scheme, so far as was necessary at that time, and providing for a canvass by the rules laid down in the Constitution; thereby they affirmed their own ineligibility as canvassers, and the execution of that duty by the President of the Senate, as will transpire more fully hereafter.* When the time for opening and counting the votes approached, in 1793, the Senate passed a resolution, in which the House concurred, prescribing their *separate* proceedings as witnesses of the transaction. It was not a law, and the authors of it, who were also the authors of the constitutional provision that defines a law, knew that it was not; but it was designed to regulate the conduct of each House on that occasion, to enable them to witness practically, and to provide a record of the votes and of their result, to be spread on the journals in attestation of the fulfilment of their duty.

THE POWERS OF CONGRESS.

The chief claim of Congress has been founded on an implication in the provision ordering the counting of the votes, which is in fact an extra-constitutional basis for it. The constitutional phrase runs, "and the votes shall then be counted," and, since no one is therein directed to perform the act, Congress claim it. To this may be opposed in brief the law of implication, as stated by the Hon. Roscoe Conkling in the Senate, in support of the treacherous "Electoral Bill":

"Wherever power is given to do a thing, permission is implied to use the means to do it."

"Whatever is essential to the full execution or enjoyment of a thing granted, is implied and inferred to be granted also."

Applying this law to the case in point, if Congress have the power to count the votes, the means are granted also. This is true; but the very question is, Have they the power? If the law of implication ran, "Wherever there is a power whose executive is not designated, Congress may absorb it," the legality of their assumption of this power

* Chapter xiii., "The Act of 1792"

would not be questioned. But that is not the case, and the allegation of an implication offers them no warrant for the usurpation.

Did they stop at this implication, the usurpation would not be so flagrant; but they do not, and they add an implication to the implication, viz.: That, since they have implied right to "count" the votes, there is also the implied right to "canvass" them.* What rule of interpretation sustains this claim has not been stated; but the result of the assumption is that, in the "Electoral Bill" of 1877, it was declared that if the two Houses jointly voted to reject an electoral return, it should not be counted. That is to say, they passed a law to enable them to do what Congress have for fifty years claimed the right to do without a law, except under the 22d Joint Rule;† and the Act was framed to legalize a *viva voce* canvass, which is forbidden by their constitutional limitation to legislation.

But again, they have invoked in their favor the language of Chief Justice Marshall:

"It is not sufficient to negative a power, that the Framers of the Constitution did not contemplate that particular power, or the exercise of that particular power; the question is, Does the language of the Constitution cover that power?"

Undoubtedly this was a wise decision of the court, but it does not add force to the Congressional claim. It is conceded that the powers of canvassing and counting are both expressed and implied in the Constitution; but that grants no authority to the Houses to assume them. Even if a plea of *ex necessitate rei* be admissible, it would argue to the right of Congress to enact a law providing for the count and canvass, but not to their authority to exercise the powers arbitrarily.

The guarantee clause of the Constitution has sometimes been educed in sustentation of their claim, in manifest contravention of its spirit and intent. The provision covers only the guarantee by the United States of "a Republican form of Government"; that is to say, a representative local self-government, which shall have full power to manage its internal affairs without let or hinderance.

Congress have frequently appealed to the general grant of power contained in the 18th clause of Sec. VIII., Art. I., which is as follows:

* Chapter vi., page 144.

† Chapter xii., "The Act of 1877."

"The Congress shall have power to make all laws, which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

This provision, as we shall see, is directly applicable to the case in point, but not in the sense with which it is usually urged. It gives Congress the power to make laws executory of "powers vested in the Government, or any officer thereof." Is the power to count and canvass the votes of the Electors vested in the Congress?

The ordinary and legal definition of "vested" is "fixed,—not contingent, or doubtful"; and therefore Blackstone defines a "vested remainder" to be "when the estate is invariably fixed to remain to a determined person." Applying this definition, if the power of canvassing the votes be vested in the Houses, it must be invariably fixed to be exercised by them. But we have seen that the very foundation of every claim they make hinges on the alleged doubtfulness of the investment; as for example, their claims of an implication, a *casus omissus*, and an *ex necessitate rei*. Therefore since, by their own showing, the power of canvassing is not fixed, but contingent and doubtful, it is not vested in them; and not being vested in them, they cannot make laws to regulate their exercise of it, much less assume it by joint vote without a law.

Judge Story, in referring to the powers which Congress may themselves lawfully exercise, makes a very lucid explanation of the intentment of this provision, as follows:

"The plain import of this clause is, that Congress shall have all the incidental and instrumental powers, necessary and proper to carry into execution all the express powers. It neither enlarges any power specifically granted, nor is it a grant of any new power to Congress.

"Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is, whether the power be expressed in the Constitution. If it be, the question is decided. If it be not expressed, the next question is, whether it is properly an incident to an expressed power and necessary to its execution. If not, Congress cannot exercise it."

Let us apply this rule to the case in hand. The question is as to the constitutionality of the power of official counting and canvassing by Congress. Are they the expressed powers of Congress? They

are not. Are they properly incidental to any of the expressed powers of Congress? They certainly are not. Therefore, Congress cannot exercise them. The law is clear and specific; it neither enlarges any power of Congress nor grants them a new power. And the principle here involved is applicable to any and every claim which Congress can advance to the right of canvassing the electoral votes.

There might indeed be a *casus omissus* here, which even Congress could not supply except by proposing an amendment, were it not for the fact that, as has been shown, the technical, legal and natural construction of the language of the Constitution demonstrates the investiture of the President of the Senate with the power of canvassing and counting the votes. Applying the constitutional rule to this case, since he is "an officer of the United States," Congress may enact any laws which are necessary to aid him in executing the duties of his office.

In conclusion of this subject, Congress is empowered as to the election of a President by the Electors, only to prescribe the day of choosing them, and the day on which they shall give their votes; and, to quote the language of Senator Bayard uttered in the Senate March, 1876, "a just and wholesome construction of the Constitution will cause the expression of one power over a subject to exclude other powers not expressed."

THE "JOINT MEETING."

A great deal of ingenuity has been expended in the endeavor to provide a name correctly characterizing the attendance of the Senate and House at the Opening of the Certificates. It has been called a "convention," a "joint convention," a "joint meeting," etc., in each instance the effort being to indicate the idea of a one-ness, a union, a coalition of the two Houses.

These efforts have always failed in providing a suitable term, because they are radically inconsistent with the express language of the Constitution. Convention, assembly, joint meeting, *et id omne genus*, are technical words employed in parliamentary practice, which necessarily involve the idea of united action; two independent bodies meeting in one hall do not form a convention or joint meeting, but two conventions; and, since their actions may be very different, they cannot be considered joint. On the other hand, the Constitution provides for

the presence of "the Senate and House of Representatives" on the occasion, and that is all which it does provide. Senate and House are also technical terms, and cannot be held to import any other connection than that of two organized and independent bodies, acting in their constitutional and co-ordinate capacities.

It was proposed in the Convention of 1787, that the President should be chosen by a joint meeting of the two Houses, the majority of all the members present electing;* and this plan obtained in the election of the Governors of nearly all the States at the framing of the Constitution.† The Fathers therefore were conversant with the features of a joint convention of the Houses, yet saw fit not to employ that method; on the contrary, they limited the attendance to two distinct official bodies, whose character and functions were elsewhere fully described.‡

At the meeting of the 1st Congress, largely representing the Framers of the Constitution, the Senate organized and sent a messenger to the House, stating that they had appointed "a teller to take a list of the votes," and "submitting it to the wisdom of the House to appoint one or more members for the like purpose"; whereupon the House appointed "two tellers," and took their seats as an organized body in the Senate chamber.§ This was precisely in accord with both the spirit and the letter of the Constitution, which required them to meet in one place, but not in one convention, and empowered each House to frame the rules of its proceedings.

In 1793 a more formal mode of procedure was adopted, but one embodying the same principle. Unanimity and harmony must necessarily prevail on such a ceremonious occasion, and the Senate framed a resolution to provide them, in which the House concurred. A law would have been unconstitutional, because it would have restricted the right of each House to manage its own business; but a concurrent resolution applied only to the prescribed occasion, and had the merit of establishing a discreet and formal precedent. It was not and is not at any time "necessary" that one House should concur in the mode of witnessing adopted by the other, and therefore such a resolution.

* Appendix, "Journal of the Convention," Aug. 24.

† Chapter x., "Early State Constitutions," and "New York."

‡ Chapter xi., "Approval and Opposition."

§ Appendix, "Annals of Congress," 1789.

requires no signature by the President ; but it is advisable that for these purposes they do concur, and therefore it was wise to institute the custom.

There are four kinds of resolutions used by the House and Senate in the parliamentary conduct of their business, which will illustrate this point farther.

A "resolution" is the method by which either House provides for the arrangement of its own proceedings ; a "joint resolution" is united in by both Houses, and is to become a law by signature of the President ; a "joint rule" is made by both Houses as a law unto themselves, which is to govern their separate proceedings touching one subject ; and a "concurrent resolution" is a temporary expedient consenting to a concurrent action, or mode of action, at a particular time. It was the last which was made use of in 1793, with the intent of arranging the mode in which they should together witness the proceedings, and it in no wise conclusively controlled the actions of the President of the Senate.

When therefore the two Houses come together, there are no means, if they had the right to canvass, of their acting in either a parliamentary or constitutional way, except by the employment of some one to transact the business for them, while they witness it. They cannot, as separate bodies, prescribe rules for the government of the "joint meeting," for such rules would have no binding force, except by courtesy ; they cannot frame rules within the meeting, for they are not a convention ; they cannot appoint a presiding officer whose acts and rulings are obligatory, for he is not their constitutional head ;* they cannot transact their business as two Houses, for there would be instant confusion, and often great disorder ; and they cannot move, debate, vote, or pass resolutions in any regular and parliamentary way. These truisms have been demonstrated time and again in actual practice. There is only one act which they can perform, and that alone they always have performed, and it is the one which the Constitution requires of them, viz. : to sit as spectators of certain proceedings, which their agents witness for them.

With this simple duty of witnessing there was no interference until 1817, when, during the progress of the proceedings, the reception of

* Chapter x., "Massachusetts."

the votes of Indiana was objected to and the President of the Senate ruled that no debate or other proceeding was in order.* A motion was thereupon made by a Senator that the Senate withdraw, "for the purpose of allowing the House of Representatives to deliberate on the matter," and the Senate passed the resolution and retired. No definite action was taken by the House, which was soon rejoined by the Senate, and the counting was completed. In 1821 there was another impromptu separation upon the question of the admission of Missouri's votes, and, when the lower House had debated and decided the point, the constitutional proceedings were resumed. This fixed the unlawful custom of separating during the Opening of the Votes, and it has since been adhered to with its accompanying delays, difficulties, and disorders. At the beginning this process took minutes, it afterwards extended to days, and in 1877 it consumed four weeks.

The fact has already been adverted to that both the Constitution and the law of 1792 require the opening and counting of the votes to transpire on one day;† and this is recognized by Congress in their custom of inscribing the reports on their journals as of one day, though in reality they may consume many. This custom is opposed by the spirit of the System, is pernicious in its possible results, and demonstrates the illegitimacy of the assumption of the power of canvassing by two independent bodies. The Framers of the Constitution were skilful workmen, and would never have devised so awkward, cumbersome, absurd, and dangerous a plan of canvassing the votes.

Their action has been likened to the retirement of a jury to consult and make up a verdict, which smacks strongly of the element of judicial consideration which they desire to give it; but we have seen that not a line of the Constitution warrants any "verdict" of the Congress upon facts which it has already effectually judged.‡

Recognizing this themselves, the Houses have been in the habit of deciding without debate the question pending; which is a clear violation of the justice that ought to permeate a canvass of the State elections. To object to the reception of the votes of Louisiana, retire, offer a resolution to reject them because no valid election had been held,

* Appendix, "Annals of Congress."

† Chapter v., page 115, and Chapter viii., page 177.

‡ Chapter iv., page 90.

permit no defence, debate, nor even statement of the facts,—as has been done,—is a travesty on justice, which is unworthy of an American Congress.

To admit discussion of all the facts which must enter into an upright judgment, under their extensive claim to canvass, is to protract the proceedings to a perilous extent, whenever the Houses happen to be arrayed against each other. Injustice is imminent in the one case, and disaster likely to ensue in the other; to both of which the Electoral System is irrevocably opposed.

Their only rational plan therefore must be to prejudge the case, by debating and deciding it beforehand, as has sometimes been done. But, as their practice runs, objection to a vote is possible at any time, and thus they cannot always anticipate a verdict. Furthermore, this method rests upon a knowledge of the votes, which the Constitution has not provided for. And finally, such an *ante-mortem* disposition of a subject is not binding on the two Houses, and has been ignored and practically overturned by one or both of them at various times.*

The arguments above presented are drawn not only from a consideration of the Constitution, but from actual past Congressional proceedings at the "joint meeting." It has never been found to produce a just canvass, nor to work rationally and harmoniously. The reason is that a canvass by the Houses is not in harmony with the Constitution, and the prevalence of disorder, danger, and delay, when they have undertaken one, demonstrates it.

ELECTION BY THE HOUSES.

We have seen that the two Houses are assembled at the Opening of the Votes, in order that they may witness to the transaction of that duty by the President of the Senate "agreeably to the Constitution," as the law of 1792 describes it, or agreeably to a general law which they may frame.

But they are present for another purpose. If no election "happens," as Hamilton expresses it, the two Houses are immediately to elect a President and Vice President. This fact in itself proves that the provision making them witnesses extends throughout the counting of the

* Appendix, "Annals of Congress," 1821, 1865, and 1869.

votes, for the result of the computation must be witnessed to as well, in order that they may show warrant for such subsequent procedure. Therefore the custom was instituted of spreading on their journals the reports of the tellers, in testimony of their presence at the Opening and Counting, as their signature, so to speak, to the execution of the will of the Electors.

Their duties in this case are few and simple, and are perspicuously enumerated in the XII. Amendment.*

"From the persons having the highest numbers, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, a President." [The votes are to be taken by States, each State, represented, having one vote; a majority of all the States elects, and two-thirds of all the States must be represented to constitute a quorum.

If no person have a majority of the votes for Vice President, "then from the two highest numbers on the list the Senate shall choose the Vice President"; a quorum being two-thirds of all the Senators, and a majority of all the Senators electing.]

The succession of the Vice President to the office of President is clearly fixed. By the Constitution, "in case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of said office, the same shall devolve on the Vice President." By the law of 1792, "the only evidence of a refusal to accept, or of a resignation of the office of President and Vice President, shall be an instrument in writing declaring the same," duly subscribed and delivered into the office of the Secretary of State. By the XII. Amendment, "if the House of Representatives shall not choose a President, whenever the right of choice shall devolve on them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President"; that is to say, for the ensuing four years.

By the law of 1792, "in case of removal by death, resignation, or disability of the President and Vice President of the United States, the President of the Senate *pro tempore*, and in case there shall be no President of the Senate, then the Speaker of the House of Repre-

* Appendix, "Constitution of the United States."

sentatives, for the time being, shall act as President of the United States until such disability be removed or a President shall be elected." Such a succession only lasts a year, however, or thereabouts, a new election by Electors being required in the ensuing December, provided two months intervene; otherwise the new election is made in the second December following, the new President is seated on the ensuing Fourth of March, and the term of four years begins on the same day.*

The XII. Amendment by its use of the words above quoted, "by the fourth day of March next following," has fixed the beginning of a Presidential term on that day. The words were obviously inserted with that intent, and only an amendment now can change it. The law of 1792 fixes it further as "the fourth day of March next succeeding the day on which the votes of the Electors shall have been given."

The Constitution has not provided for the case of a failure to count the votes and declare the result by the Fourth of March, or for an ultimate failure to declare the President. In the recent Congressional proceedings, owing to the delays ensuing upon their method of canvassing the votes, such a crisis was imminent; and the question arises, What would be the legal effect of such failure?

As to the former case, though the Amendment does recognize the Fourth of March as the legal beginning of the term, it could certainly not be construed so as to defeat the electoral election of a President. Everything up to this point has been regular, but the result has not been reached. It is clear that neither House elects except upon the failure of the Electors; but the Electors have not failed; their votes are yet awaiting a formal canvass, but in fact they have elected the President. The President, then, being constitutionally elected, is, by reason of the failure of Congress to declare him, disabled from discharging the duties of the office; and therefore the law of 1792 becomes operative, and the President of the Senate or Speaker of the House acts as President "until such disability be removed." His term of office, when he is declared, dates back to the Fourth of March.

An apt illustration of these principles appears in the transactions of 1789. By resolution of the Congress of 1788,† the day appointed for

* Chapter xiv., "Vacancies and Terms."

† Appendix, "Resolution of 1788."

declaring the President was "the first Wednesday in March next," to wit, March 4, 1789. On that day Congress were not assembled, and therefore the declaration was not made; nor was there a quorum for business until April 6, when Washington's election was duly proclaimed.* In this case Congress prevented the final step in the transaction, though the President was undoubtedly chosen constitutionally, and was the legal President of the Republic; he did not assume his office for some six weeks afterwards, and he held it for four years from March 4.

As to the second case, the election is complete and constitutional, but Congress finally refuse to witness it, or the two Houses disagree, or Congress repudiate the declaration of the President of the Senate. Then the President of the United States cuts the Gordian knot,—if necessary, with the sword,—and inaugurates the President-elect. "He shall take care that the laws are faithfully executed," and in doing so he must be guided by his judgment and his oath.

As events are shaping themselves, both these lamentable possibilities may happen at any future election; so long as Congress count and canvass the votes, an unruly majority or a political division of the Houses may precipitate them upon the nation. There is no limit to the injustice, fraud, and usurpation which Congress may be guilty of, while exercising these powers. Is it wise for the people to look on in silence whilst these dangerous exigencies are fomenting, and permit the terrible results to fall upon them one day overwhelmingly?

Under the genuine Electoral System heretofore developed, no such direful happenings are possible. On a given day the President of the Senate opens the certificates, thus disclosing the legal votes according to the law or Constitution, and declares the result. It is the work of a few hours only, and there can be no failure in it. With an efficient law, if any State be dissatisfied with her representation, the case can be laid before the Courts of the United States, and be by them determined before the arrival of the Fourth of March. Everything is done by the Law, as was intended, justice is meted out, and peace and order inevitably follow.†

By the XII. Amendment, if there be no election by the Electors,

* Appendix, "Annals of Congress," 1789.

† Chapter xiv., "A New Law."

the House is not compelled to elect before the Fourth of March ensuing. It was a lamentable error to place such a provision in the Constitution, and it should be rescinded.

It would not be difficult to demonstrate that the design of the Fathers was that the House should elect a President on the same day as that on which the counting of the votes was ended.* They use the phrase, in the original section, "the House of Representatives shall immediately choose by ballot one of them for President." The word "immediately" means "instantly, without delay"; and the circumstances attending its insertion by the Convention show clearly that its purport was to require the election to be made at least on the same day. Had the Constitution not employed the word, it would have been incumbent upon Congress to supply it in their law, for only thus could the spirit of the System be enforced. To permit the House to extend their duty over a week or a month, is to permit them to extend it over six months, if they please to pass a law changing the day for opening the votes. Intrigue, fraud, and corruption will be admitted, and they will riot in the capital until a President is elected; and the result must be oftentimes to nullify the fundamental principle of the System.

Writing to George McDuffie on this point, January 3, 1824, Mr. Madison, in criticising an amendment proposed, says: "Would it not be better to retain the word 'immediately' in requiring the two Houses to proceed to the choice of President and Vice President, than to change it to 'without separating'? If the change would quicken and insure a final ballot, it would certainly be a good one." To limit it to a specific time would be a better plan than either; twenty-four hours are more than ample for Congress to select a President; in this representative Republic the votes of a majority of the people should guide their choice, and they are readily ascertained.†

In 1801, during the memorable contest between Jefferson and Burr, party spirit ran so high that for seven days the balloting of the House continued before the conclusion was reached, though the popular vote was thoroughly well known. Neither of the candidates had been in the Federal Convention, and but one member of the House had been a signer of the Constitution, though unknown to have engaged in

* Chapter v., page 115.

† Chapter xiv., "The Secondary Election."

framing it. They ignored the law in thus extending the time of the election, at what expense of corruption is not known, but, as history shows, to the verge of a disruption of the country. It was not the fact that the House elected the President which made the process dangerous, but that for seven days of excitement and suspense the two parties bitterly contested it, whilst the country fumed and struggled with them.

To prevent a recurrence of the cause which introduced this contest, the reception by two persons of an equal number of votes, the office being unnamed, they hastily, and, it may be added, stupidly, passed the XII. Amendment. By it the President and Vice President are particularly voted for, and that is all. At any election hereafter two persons may again have the same number of votes for both President and Vice President, and the election therefore go to the two Houses. The authors of that Amendment, therefore, accomplished little good, and they made way by it for a flood of evils. Some of these are already apparent in the nominating conventions of the parties, the pledging of the Electors, etc., which have heretofore been noticed; and others will follow on the first occasion when the House are evenly divided as to parties, and have four weeks or more at their disposal in which to elect a President.

In the mean time, if any two persons are found to have an equal and the highest number of electoral votes, the original constitutional provision, which the XII. Amendment failed to reform, prevails, and the election goes to the House, since no one has a majority of the votes. From the persons having the three highest numbers, including the two who have an equal number, the House must choose, as they did in 1801. Charles Pinckney explains the intent of the Constitution at this juncture in the following language:

"But it was to be supposed that instances would occur where two candidates, having a majority, may be equal in their number of votes, or where no candidate had a majority of the whole of the Electors appointed, and an election must take place by the national Legislature or a branch of it. The question then arose, How was this election to be guarded to prevent, as far as human prudence could, improper combinations? It was a difficult thing, and required much deliberation.

"The Constitution expressly orders that the Electors shall vote by ballot, and we all know that to vote by ballot is to vote secretly; that

the votes shall be sealed up, and not opened until the day appointed by law; and that if no election has been made by the Electors, an immediate one shall take place by the House of Representatives.

"That so far from appointing committees to receive memorials or petitions respecting the election, or to decide upon it, or so far from having any right to delegate an authority on this subject (to a commission), Congress shall not themselves, even when in convention, have the smallest power to decide on a single vote; that they shall not have authority to adjourn for one moment, but shall instantly and on the spot, in the case of no election by the Electors, proceed to the choice of a President, and not separate until it is determined."

These sentiments, coming from one of the prominent members of the Federal Convention, and enunciated a year before the contest between Jefferson and Burr over their tie vote, must be held to reflect the exact sentiments of the Framers of the Constitution. They authoritatively dispose of a number of the questions mooted since that time, and accord with the principles developed in this treatise. They effectually declare against the power of Congress to canvass the votes of the Electors, and in favor of an instant election by the House, whilst they deprecate all "Electoral Commissions," and assert that the two persons having equal votes are to be included in the number from which, in one event, the President is to be chosen.

A failure to elect by the Electors occurs only when no person has a majority of the votes of all the Electors "appointed." This limiting word was inserted in order to prevent a misconstruction of the original phrase, and a reckoning of only the Electors voting.* All Electors, therefore, legally appointed, must be reckoned in announcing the majority, whether they vote for President or not. The rule applies to the ascertainment of the Vice President as well, and was designed to make these two exalted officers the *bona fide* representatives of a majority of the people.

One other question only arises. What would be the effect of a failure of all the States to appoint Electors, or of all the Electors to vote for a President and Vice President? Then the Houses must elect them.

This is a National and not a Confederate Union, and there is in-

* Chapter xi., "Amendment and Acceptance."

herent in its Government the power of self-preservation, until the day that the people, who upreared it, shall actually overthrow it. The appointment of Electors is a privilege of the States, to be used for the express purpose of selecting an Executive; "the executive power *shall* be vested in a President," "he *shall* be elected as follows," and, in the first method, "the Electors *shall* meet and vote for President." If any be appointed and vote, the Constitution requires the President and Vice President to be elected by a majority of them; and whilst an election by the Houses is referred to in a particular case alone, the principle involved is that they shall elect whenever the Electors have failed to do so. Congress is amply empowered to perpetuate any branch of the national Government.

CHAPTER X.

SOURCES OF THE SYSTEM.

"In all the changes to which you may be invited, remember that experience is the surest standard by which to test the real tendency of the existing constitution of a country."—GEORGE WASHINGTON.

EARLY STATE CONSTITUTIONS.

IN framing the Constitution of the United States the Fathers drew on all the resources of history for their principles, and searched the world for models. It is not surprising therefore that we find them employing the old Articles of Confederation, as well as the State Constitutions which supervened upon the independence of the Thirteen Colonies.

After the Declaration of Independence, the new-fledged States one by one framed Constitutions, though one or two of them used their former charters, amended where their new principles required, until after the formation of the existing Union. Some of these State Constitutions embodied radically democratic principles, and others verged towards an aristocratic form of government. By some the Governor was elected by the people, but by most of them he was appointed by joint ballot of the Legislature, whilst the Legislature was purely representative in all of them.

During the progress of the debates in the Convention of 1787 frequent reference was made to the practices of the several States, and an examination of their Constitutions develops the fact that the Fathers found their models generally among these, with which they were practically familiar, and where they might naturally have been expected to find them. This is specially the case with regard to the national Executive, both as to his powers and duties, and as to the manner of his appointment. But these points were all contested closely in the Convention, and after the lengthy discussion which the subject under-

went, the result appears as it only could issue from the hands of so honest and sagacious a body of patriot law-makers, viz.: a system drawn from many of the State Constitutions in some of its parts, selecting the best principles and including the worthiest policies which these several sources offered.

Thus we discover that our Electoral System is drawn largely from the old Constitutions of Maryland and Massachusetts; from the former as to its foundation upon an independent body of Electors, and from the latter as to the canvass of their votes and the declaration of the result.

These facts naturally lead our investigation back to these and other State Constitutions for light upon the principles embodied in the Constitution of the United States. They furnish a great deal of information relating to all the parts of our Electoral System, but, since many of these are so well settled already by our discussion of them heretofore, they will not be now considered, except chiefly as to the Opening of the Votes.

Subsequently to the adoption of the Federal Constitution, all, or nearly all, of the thirteen original States remodelled their Constitutions upon that of the United States; and this was regularly so with the new States, as they were admitted into the Union, who also copied more or less from each other. We may therefore expect more light to flow from an examination of these later Constitutions, and shall glance at them.

It is obvious that where there has been a re-enactment by the United States of certain ancient provisions, whose original intent was well defined; or where there have been verbal changes in or additions to the provisions of the Federal Constitution, as copied by the States, their evidence is valuable in determining the meaning of parallel provisions in our Electoral System.

MASSACHUSETTS.

In prescribing the mode of electing a Governor and State Senators, the Constitution of Massachusetts, framed in 1780,* provided the Federal Convention with a model.

This transpires not only from a comparison of the two methods, but

* Appendix, "Constitution of Massachusetts."

from the fact that Rufus King, a prominent member of the Convention and one of the committee that framed the Electoral System, was a delegate from Massachusetts. The various changes made in the phraseology furnish very accurate evidence of the intent of the Framers of the Constitution.

In Massachusetts, "the Selectmen of the several towns shall preside at such meetings." "Preside" is a parliamentary term, meaning "control, or govern," and in this case grants the conduct of the day's business to the Selectmen, as was judicious. They were the chief officers of the town, and they were to have charge of the mass of voters, undisciplined and unorganized. In directing the President of the Senate to open the certificates, the Convention omitted this provision, and very reasonably; he is not the chief officer of Congress, who are two organized and independent bodies. The law of 1877 which made him the presiding officer was both unconstitutional and unreasonable.

In Massachusetts, the Selectmen "shall receive the votes of all the inhabitants of such towns, present and qualified to vote." This provision makes them the official receivers of the votes, and the judges of their validity. The Constitution makes the President of the Senate the official receiver of the votes, to accept them if agreeable to the law. The Selectmen were necessarily obliged personally to identify the voters; but the law itself identifies the electoral votes, and all officers of the United States are appointed solely to execute the laws.

In Massachusetts, in voting for Senators, the Selectmen "shall sort and count the votes in open town-meeting, in the presence of the town clerk, who shall make a fair record, in the presence of the Selectmen and in open town-meeting, of the name of every person voted for and of the number of votes against his name."

This is a beautiful illustration of the early workings of our System. It exhibits not only what the Fathers had in mind when framing their provision, but what they knew the Constitution intended when they came to execute it in 1789 and 1793. The Selectmen sorted and counted the votes publicly and before the clerk, who represented the meeting officially; and the President of the Senate disclosed the votes contained in the certificates, practically sorting and counting them publicly before a witnessing Congress, who were represented by their clerks or tellers. In the former case the meeting had no representative, and the law gave them one; in the latter, the Houses are em-

powered to regulate their own affairs, and each appointed their own agents. The town clerk made a record of the votes as they were sorted and counted, and the tellers "made a list of them as they were declared"; sorting and counting were official acts, and so was this declaring; and Rufus King was the Senator, in 1793, who framed the resolution fixing the mode of witnessing, and the teller appointed to make the list of the votes.

In neither instance were the witnesses to act except as spectators, and in both cases the officers were to transact all the necessary duties. This is shown further by the provision for the election of a Governor, that "the town clerk, in the presence *and with the assistance* of the Selectmen, shall sort and count the votes," where it was necessary to expressly provide for the official aid of the witnesses.

At the election of a Governor, the town clerk was to "make a public declaration" of the result, being one of the canvassers and the proper official to perform it. It is reasonable that this should be done in the election of both the Governor and President; but in the former it was not necessary, because the votes were subject to another canvass, and therefore was prescribed; whilst in the latter it is the very end and aim of the opening and counting, and therefore is included in them.

In Massachusetts "the lists" were to be then sealed up, "attested" by the clerk and the Selectmen, and "transmitted" to the Secretary of the Commonwealth. Here they are nearly identical with the electoral certificates, and are to undergo another canvass. But mark the difference! "The Secretary shall lay the same before the Senate and the House of Representatives, to be by them examined." Here the Secretary is a mere recipient, and the two Houses are the official canvassers of the certificates.

The fact that, in arranging their plan from the model of the Massachusetts Constitution, the Convention omitted this provision for a canvass of the votes by Congress, explains their purpose as exactly as if they were here to tell us of it. It was however a necessary sequence of the fundamental principle of their System that they should omit it, and they could not have consistently done otherwise. Massachusetts had no "Electors," and therefore followed the custom at that day in all the States, of submitting the election returns to the supervision of her two Houses; the Convention resolved deliberately that Congress should not interpose in an election, undoubtedly because they knew

its many evil issues in the State elections, and therefore rejected the language necessary to confer the right upon them.

In case of an election, the two Massachusetts Houses were to "declare and publish" it; and in case of a failure to elect, the Houses were to elect two persons out of the number voted for, and from these two the Senate were to elect the Governor.

NEW HAMPSHIRE.

In framing the Constitution of New Hampshire, adopted in 1792,* the models evidently were furnished by Massachusetts and the United States.

Here the town-meetings were to be "governed" by a Moderator, "who shall, in the presence of the Selectmen, in open meeting, receive the votes." He was also to "sort and count the said votes in the presence of the Selectmen and of the town clerk," and the latter was to "make a fair, attested copy" of them, and send it to the Secretary of State.

The Moderator in this case undoubtedly is taken from the Constitution, and has all the duties which therein devolve upon the President of the Senate; whilst the witnesses are retained, as an excellent feature of both systems. Doubtless some difficulty had arisen in Massachusetts as to what votes were to be counted, and, warned by that, New Hampshire specified "the said votes," that is, those which had been duly received. This may be more specific, but certainly is not more imperative, than in the cases of the other two Constitutions, where it is omitted.

Recollecting that this Constitution was framed five years after that of the United States, with the latter as a model, too, it nevertheless reiterates the exact language of that of Massachusetts in providing canvassers for the certificates; showing thereby that it was the judgment of the New Hampshire framers, that the language of the national System did not cover a canvass by the Houses. "The Secretary shall lay the same before the Senate and House of Representatives, to be by them examined." This is a contemporaneous exposition of the Constitution's meaning.

* Appendix, "Constitution of New Hampshire."

CONNECTICUT.

The Constitution which Connecticut adopted in 1818* re-enacted the general plan of her neighbors in New England.

"A fair list" of the ballots was to be made, and "laid before the General Assembly"; and it is noticeable how all of these State Constitutions omit the language used in that of the United States in a similar case. The lists were to be laid before the General Assembly, not "opened in their presence"; which latter would be an utterly absurd procedure, if they were authorized to canvass them—making them formal witnesses to a mere opening of the packets. This fact is corroborative evidence of the intent of the Fathers in making Congress merely witnesses to all the proceedings attending the disclosure of the votes.

"Said Assembly shall, after examination of the same, declare the person whom they shall find to be legally chosen." It is still deemed necessary to empower the two Houses to canvass the votes by express provision; yet the Constitution of the United States had been known now for thirty years, and debated carefully when first promulgated. Connecticut had no Electoral System, and therefore canvassed by her Houses, which she knew she could not do by adopting the provision of the Constitution.

But she obtained one idea from that Constitution, which was a very judicious one and so far an improvement on those of Massachusetts and New Hampshire, viz.: She directed her General Assembly to provide for the canvass and determination of the election returns "by law." Thereby she only reaffirmed what the duty of a Legislature is, being warned doubtless by arbitrary and unjust canvasses in the neighboring States, where the Houses canvassed after the preposterous manner of our Congress.

VERMONT.

The Constitution of Vermont adopted in 1793,† for sufficient reasons doubtless, chose a radically different plan of canvassing the returns.

The ballots of the freemen were to be given to the constable, who

* Appendix, "Constitution of Connecticut."

† Appendix, "Constitution of Vermont."

sealed them up and sent them to the General Assembly. "At the opening of the General Assembly there shall be a committee appointed out of the Council and Assembly, who shall proceed to receive, sort, and count the votes for Governor," and declare the result.

It is noticeable that, in all the foregoing cases, there is but one person or set of persons who are appointed to officially receive and count the votes. The policy of this is founded in reason, and the practice is essential in producing harmony and justice, as has been heretofore adverted to; and its universal provision in these State Constitutions argues to the same intent in the phraseology of the Federal Constitution, which is ignored when the Vice President revises the certificates and Congress count the votes.

NEW YORK.

When the Constitution of 1777 was adopted by New York,* the people elected certain officers by a *viva voce* vote,—a custom which obtained in some of the Southern States until a comparatively recent period.

But the Constitution recites the fact that "an opinion hath long prevailed among divers of the good people of this State, that voting by ballot would tend more to preserve the liberty and equal freedom of the people"; and it therefore ordains that, "to the end that a fair experiment be made," an act to this effect shall be passed by the Legislature, "after the termination of the present war between the United States of America and Great Britain."

In 1787 the act was passed, which provided that the election returns should be sent to the Legislature, and that "a joint committee shall be appointed yearly to canvass and estimate the votes." This was the same year in which the Federal Constitution was framed; yet the Convention, with that method before them, made no provision for a joint committee, an "Electoral Commission," nor any joint proceedings, at the reception and opening of the electoral returns.

PENNSYLVANIA.

After the establishment of the Union, Pennsylvania was the first State to remodel her government in conformity with that of the United

* Appendix, "Constitution of New York."

States;* the distinguished Thomas Mifflin, a member of the Federal Convention of 1787, being the President of her State Constitutional Convention of 1790.

In that instrument there was no provision for an Electoral System, but the method of declaring the result of an election for Governor was carefully copied from that of the nation, with just enough divergence to give point to the then well-understood provisions of that System. The election returns were to be "sealed up and transmitted to the Speaker of the Senate," who was to "open and publish them in the presence of the members of both Houses of the Legislature," and "the person having the highest number of votes shall be Governor."

Let it be remembered that, whatever may be the doubt to-day, in 1790 the legal and technical meaning of the provisions of the Federal Constitution was exactly understood. In the Pennsylvania case the prime object of the return of the votes to the seat of government was to canvass and aggregate them in the ascertainment of the Governor-elect, and the only words used to express this official transaction were "open and publish." Therefore the Speaker of the Senate must have determined the Governor by simply opening and publishing the returns; for that is the definite consummation of the transaction by express provision here, it being added only that "the person having the highest number of votes shall be Governor." The person having the highest number of votes was, then, determined by opening and publishing the returns.

There must be a canvass of all election returns, and how is it provided for here? Not by the publication, for that is only an announcement of the votes; and there is therefore left the single word "open" to import it.

Now it is clear that, as a rule, framers of Constitutions are a very exact and careful set of men in their use of words and phrases; it is their prime business to provide such language as will admit of no misinterpretation. It must further be conceded that, in copying the Constitution of the United States, they must have been assured of the precise technical and legal force of words and phrases in that instrument, and that they intended to employ them with the same signifi-

* Appendix, "Constitution of Pennsylvania."

cance. When therefore they use the word "open" to provide for the canvassing of the returns, it is obvious that they demonstrate that to have been its meaning in the Constitution of the United States.

Furthermore, there is no question of the official nature of the Speaker's duty here, and of the sole duty of witnessing its performance which was provided for the two Houses. Everything was to be completed in their presence, which was the technical phrase in general use to import that duty. They were to be witnesses to the execution of the will of the people, which was published in their presence, agreeably to the law, by a ministerial officer appointed by their Constitution. The language here avoids the alleged difficulty in the Constitution of the United States, by omitting the official counting, and vindicates the interpretation heretofore given to the function of the President of the Senate in opening the votes.

There was no direction to the Speaker to count the votes, and its significant omission is a vindication of our interpretation of Counting. They must have omitted it purposely, and with some specific intent, and the question is, Why? The answer follows in the next paragraph of Pennsylvania's Constitution, where it is ordained that "contested elections shall be determined by a committee to be selected from both Houses of the Legislature, and formed and regulated in such manner as shall be directed by law."

It has been already shown that the official Count was the official computation of the result, which must have binding force in seating the President so declared. But the Pennsylvania Constitution, anticipating contests, prohibits the Speaker from executing such a duty, because it is about to invest the two Houses with the exclusive right of such determination. It is simply a difference of policy in the two systems. The Pennsylvania system, being the customary State method, clothed the two Houses with a plenary power here; whilst the national Electoral System, based on the non-interference of the two Houses, invested them with no rights in the premises.

Let it be observed also, that, in order thus to empower their Houses, the framers of the Constitution of Pennsylvania deemed it necessary to insert the above special clause, as a grant of such power. Copying the national law and thus amending it, they show beyond all doubt that the right of determining contested elections was not deemed, in 1790, to be vested in the two Houses of Congress by the Constitution.

And further they decree judiciously that, when such contests are to be decided, the determination shall be in the manner prescribed by a law.

Joined to the foregoing argument is the fact that at least eleven other States adopted these same provisions in their constitutions, with slight verbal changes, and that all saw the necessity of amending the provisions of the Constitution of the United States by the addition of a clause, specifically empowering their two Houses to determine contested elections, and granting them no authority whatever over elections that were not contested. This was the case in the constitutions of Kentucky in 1799, Ohio in 1802, Indiana in 1816, Alabama in 1819, North Carolina in 1830, Delaware in 1831, Mississippi in 1832, Tennessee in 1834, Arkansas in 1836, Florida in 1838, and Texas in 1845.

MARYLAND.

To Maryland undoubtedly belongs the honor of furnishing to the Fathers the basis of our Electoral System, and its essential features are found in her Constitution of 1776,* the virtues of its methods having been openly canvassed in the Federal Convention, July 3, 1787.

That instrument provided for a House of Delegates and a Senate, who chose the Governor in joint convention. The Delegates were to be elected in the ordinary way, but the Senators by an Electoral System, briefly as follows: "All persons qualified to vote for County Delegates" were to meet every fifth year and elect "by a majority of votes two persons for their respective counties, to be Electors of the Senate." Said Electors were to meet at an appointed place, and "proceed to elect, by ballot, fifteen Senators, men of the most wisdom, experience, and virtue. Out of the gentlemen proposed as Senators," the fifteen who, "on striking the ballots," had a majority, were to be "returned and declared as duly elected."

Only persons "qualified to be county delegates" were eligible to be Electors, and it was specially provided that "the Electors of Senators shall judge of the qualifications and elections of members of their body." It was further specially provided that "the Senate shall judge of the elections and qualifications of Senators."

* Appendix, "Constitution of Maryland."

In copying this system, there is much significance in the changes made by the Federal Constitution. It prescribes no qualifications of the Presidential Electors, wherefore no one may question them on that ground. It prescribes, not a popular election, but an appointment of them by the States; wherefore not the people, but only the several States, may question its validity. It provides no person or body who shall judge the election and qualifications of the Electors; wherefore neither themselves nor the nation may determine these matters.

The chief import in the difference between the two systems lies not in the fact of a variation, but in the fact that, in copying the former, the Federal Convention made the variation advisedly. The National System, therefore, must be held not to include as implications, what the Maryland system provided by express direction. And thus, as to these several points, the model which the Fathers used amply vindicates the conclusions heretofore attained by this analysis.

HAMILTON'S SYSTEM.

In a letter to Timothy Pickering, bearing date September 16, 1803, Alexander Hamilton refers to "the plan of a Constitution which I drew up while the Convention was sitting, and which I communicated to Mr. Madison about the close of it."

The "plan" spoken of appears in full in Madison's "Debates," as it was given to him.* It also appears from the journal of the Convention of 1787, that on the 18th of June Colonel Hamilton submitted and expounded a plan of a Constitution, which provided that the election of the Chief Executive should "be made by Electors, chosen by Electors, chosen by the people."† The finished plan and the outline last referred to are evidently one and the same, the former being possibly the written elaboration of the latter, which was verbally explained when first propounded.

Though nowhere precisely so stated, it would nevertheless appear that Hamilton's system, modified by the existing political environment, was the immediate ancestor of our Electoral System. The fact that it does not provide for a Vice President argues to its early construction, that officer being the product of our National System, and devised for

* Appendix, "Hamilton's Plan."

† Appendix, "Journal of the Convention," June 18.

its necessities, as will be shown hereafter.* Hamilton undoubtedly obtained his theory from Maryland, and, in applying it to the requirements of the new Republic, he made it an Electoral System pure and simple, more extensive than its source, and more perfect than its issue. The whole process of electing a President was conducted without any reference to or intervention of the Legislature, and its provisions were so constructed that they could lay no claim to any of its privileges or duties. When presented, it was opposed by the leading opinion then swaying the Convention, that the National Legislature should elect the President, as the State Legislatures had always elected the Governors; and it only triumphed towards the close of the deliberations, and then at the expense of a compromise. Whilst the election of the President was to be made in the first instance by Electors, if that failed, Congress should have the right to complete it; and thus the System remains to-day, mistakenly shorn of part of its strength by the necessary compromise of its principles, at one juncture, to the policy of conciliating its short-sighted opponents.

A hasty glance at Hamilton's plan in comparison with the Electoral System will serve to enlighten us somewhat as to a few points alleged to be doubtful in the latter.

The substance of the plan was as follows: When a President was to be elected, the Supreme Court appointed in each State a day for the election of the First Electors, a day for their meeting, and a day for the meeting of the Second Electors. The First Electors, equal in number to the Senators and Representatives, met on the appointed day and at an appointed place, and voted by ballot for President and Vice President, making and certifying two lists of the votes. Each college also elected two Electors, who were called the Second Electors, to each of whom was given one of the certified lists. The Second Electors met "precisely on the day appointed, and not on any other day, at one place," the Chief Justice presiding, but having no vote. The lists were then and there "produced and inspected," and if any one had a majority of the votes, he was the President. If not, from the persons having the three highest numbers, the Second Electors chose a President; "but if no such choice be made on the day appointed for the meeting, either by reason of non-attendance of the

* Chapter xi., page 233.

Second Electors, or their not agreeing, or any other matter, the person having the greatest number of votes of the First Electors shall be the President.

"The Legislature shall, by permanent laws, provide such further regulations as may be necessary for the more orderly election of a President, not contravening the provisions herein contained."

The primary idea of Hamilton's plan is, that Congress shall not interfere in electing a President; and the secondary idea is, that it shall be swift and sure, and precisely according to the forms of law. The whole tenor of our Electoral System shows that the framers of it designed compliance with the spirit of this plan, and with its main policy also, except in the occasional possible elections by Congress when the Electors failed.

Instead, however, of prescribing an election of Electors by the people, they provided for their appointment by the States, and the alteration proves the plenary power which was thereby granted over it. They empowered Congress to regulate it by general laws, which ought also to be "permanent" without special command to that effect. If a choice were not made by the Electors, Congress were to elect "immediately," so that no delay whatever should occur. And to procure still greater certainty and expedition, a ministerial canvasser was appointed, related to Congress as Hamilton's presiding officer to the first Electors, whose duty "on the day appointed, and not on any other day," was to disclose the votes and declare the result of the election.

CHAPTER XI.

GENESIS OF THE SYSTEM.

"**You have improved upon your first essay by the adoption of a constitution of government better calculated than your former for an intimate union, and for the efficacious management of your common concerns.**"—**GEORGE WASHINGTON.**

THE CONVENTION OF 1787.

If it be desirable to ascertain the original quality of a stream, with whose fluent waters at certain points impurities have mingled, the inquirer must inspect the fountain whence it issues clear and undefiled. We have already glanced at the several springs within the constitutions of the States, which form the sources of the Federal Constitution, and may now direct our view to the point at which their waters meet and mingle, harmoniously uniting in a symmetrical Electoral System.

During the four months through which the Convention of 1787 sat, a journal of their proceedings was kept, and this, together with the outline of their debates compiled by James Madison, furnishes much information concerning the formation of the Constitution. To comprehend that instrument fully, one must make a careful study of these records; to them the eminent statesmen and jurists of the past have always turned for light and knowledge; and thither we may now revert for demonstration of the true principles of the Electoral System heretofore set forth.

Says James Madison, in a letter to Andrew Stevenson, dated March 25, 1826,—

"I cannot but highly approve of the industry with which you have searched for a key to the sense of the Constitution, where alone the true one can be found,—in the proceedings of the Convention, the contemporary exposition, and, above all, in the ratifying conventions

of the States.* If the instrument be interpreted by criticisms which lose sight of the intentions of the parties to it, the purest motives can be no security against innovations materially changing the features of the government."

The intentions of the Framers are amply shown by their debates and proceedings during process of constructing it. It was not with them the original plan for the election of an Executive, nor approved of generally when first suggested; but as its transcendent advantages over every other system were presented, and as the delegates increased in knowledge of it, it at length captivated the Convention, became more popular than other rival systems, and was finally adopted by general consent.

We can, at this date, trace the primary plan of an election by Congress in its conflict with the experience of the Fathers, note the amendments by which they tried to improve it, observe the failure of their expectations and the effort at a reconstruction, discover the first proposal of an Electoral System and its indifferent reception, see the various phases in which it was presented and the reasons for them, watch its progress in their esteem and their after cordial acceptance of it, read the first elaborated system and see its errors and its weaknesses, and finally learn the whys and wherefores of its alteration to the present form.

Many of these facts and reasons have heretofore been noticed, and for this cause will now be only glanced at or omitted. Of necessity a minute investigation of the subject is forbidden by the limits of this treatise.

ELECTION OF PRESIDENT BY CONGRESS.

The proposition to elect the President by Congress† was an out-growth of the prevailing custom at that period, and was the manner in which the States chose their Executives. It was, therefore, natural that it should be proposed at the outset and supported by some of the members of the Convention, but particularly by its two original advocates, Randolph and Pinckney.

* The right of Congress to choose a President in the event of a failure by the Electors, was amply discussed by the State conventions of 1788; but their right to choose him by a canvass, or a "commission," or their right to count the votes was never mentioned (though an analogous case), for the obvious reason that it was known not to exist.

† Appendix, "Journal of the Convention," May 29.

At this date only two projects had presented themselves, the first as above described, and the second an election by the people.* The latter had been condemned at once, and at no time found rational support. The delegates were men skilled in the customs and politics of their several States, and they had seen the evils of a popular election there.

Since the Federal Convention sat, step by step their System has been perverted, until now we practically elect a President by the popular vote. When we calmly consider the universal excitement attending it, the loss of time, the waste of money, and the heat and passion engendered; when we observe the demagogue triumphing through it, the low arts employed to catch the vulgar vote, the intemperance, rioting and excesses accompanying it; when we see business everywhere prostrated, the wheels of commerce blocked and the artisan and tradesman praying for the end to come, at every quadrennial return of it,—it is proof enough of the profound sagacity of the Fathers in rejecting absolutely a popular mode of election. The country has departed from their wiser principles, and it pays a heavy penalty for doing so.

But there were also cogent objections to the plan proposed, and at the outset it met with the disapprobation of some of the most prominent delegates. The power with which it was necessary to invest the Executive, and the immense extent of his patronage as the nation grew, were elements sufficiently momentous to contemplate without superadding the intrigue and corruption of an election by Congress.† Every rational consideration dictated the interposition of some barrier between the independence of the President and the hordes of politicians who would certainly assail him, and the principles of government required that the Executive of the laws must have no fetters placed upon him by the law-makers.‡ To so exalted and responsible a station it was desirable that the best and purest, as well as the most capable, man in the land should be elevated, and it was reasonable to suppose that such would be the custom, if only intrigue could be excluded from his election. The far-seeing members of the Convention, apprehensive of the future under the plan proposed, were therefore

* Chapter ii., page 28.

† Appendix, "Pinckney's Speech."

‡ Chapter v., page 111.

dissatisfied with it; it never met their approbation, it always was condemned, and yet at the outset they had no other expedient to offer.

In discussing the Constitution subsequently, the "Federalist" cites, as one of the most commendable and advantageous features of the Electoral System, the fact that the election of the President is secured ~~without corrupting the body of the people."~~ That was the argument addressed by the statesmen of a century ago to the people, urging them to accept their own exclusion from the election; they did accept it, and it has been heretofore noted that the mode of electing a President was the only part of the Constitution which met with universal approbation. ~~approved~~

AN ELECTORAL PLAN PROPOSED.

At this juncture* James Wilson offered his scheme, which proposed the formation of minor districts throughout the country, the people of which should appoint Electors.

It was an effort to get rid of the greater difficulty, but it failed to go to the root of the matter, and it introduced other complications. It was an indirect appeal to the people which must be avoided if possible, it superseded the authority of the States and regulated their internal affairs by national law, and finally it was thought a cumbersome and expensive method, which at this stage of their proceedings the Convention may be forgiven for urging; and it was, therefore, indefinitely postponed.

Recognizing the dangers of an election by Congress, they yet thought it possible that their constituents and the force of public opinion might hold them in check; but they knew that an excited, passionate, and thoughtless populace could not rein itself in when the exigency arose. Further, though the States were about to resign their sovereignty, they proposed to preserve their autonomy, and this proposition trenched upon it.

The next proposal, made by Elbridge Gerry, recognized the States by providing for an election of President by their Executives; but it was promptly negatived.

We can see at a glance that, while this offered exemption from the evils of the Congressional plan, it provided others similar and perhaps

* Appendix, "Journal of the Convention," June 2 to 18.

worse. A President so elected would in no sense represent the nation, which was specially desirable, but a clique of powerful men, who would be sure to prostitute their right to selfish ends. It would be a non-republican system. Furthermore, the Presidential question would enter every fourth year into the State elections and corrupt them. So wide a departure from reason and propriety was not entertained for a moment, and its proposal is only excusable because it was an effort at something other than the original plan, and because it admitted light into the obscurities of the question.

We are not surprised therefore, at this stage of the proceedings, that the plan of Alexander Hamilton met with an approval which caused at least its entertainment. It propounded the Electoral System in its entirety.* The people were to vote for wise and discreet men, who, unpledged and independent, should select the President, acting purely and patriotically so far as human laws could possibly insure it; if they failed to elect at their first balloting, a second set, chosen from themselves, should make the choice. That this plan was not carried out *in extenso* was owing to the opposition of the partisans of a Congressional election, which it superseded finally, but at the expense of half its provisions. It had the eminent merit of providing both a popular representation and an election not likely to be tainted by corruption, of protecting State rights and yet of not gravitating towards Congressional wrongs; but it was too radical a measure to obtain the requisite support, however excellent it was.

APPROVAL AND OPPOSITION.

When the Congressional mode had again come before the Convention,† the strong desire to change it appeared at once in a proposition to employ Electors chosen by the State Legislatures.

This was an improvement on the Gubernatorial plan, but was rejected, because it involved many of the difficulties attaching to the other; it opened the way for frauds, though to a less degree, but it necessarily introduced national politics into State affairs. It was an electoral plan however, and any electoral plan was preferable to an election by either Congress or the people; therefore, when the same

* Chapter x., page 223.

† Appendix, "Journal of the Convention," June 19 to August 31.

proposition was revived two days later, it was accepted, subject to modification.

The question had at length resolved itself into the selection of one of three methods; either the people must elect, Congress must elect, or it must be done by some intermediate official body. The latter plan achieved the victory, and, from this time forth, the Convention were determined to have, in one shape or another, an Electoral System. This Legislative plan particularly recognized the authority of the States in the election, which they were resolved not to give up, and it also recognized the people. Therefore it was approved, and, with an amendment or modification to the effect that the Legislatures should choose the Electors "by lot," it was referred to the committee engaged in drafting a Constitution.

In the mean time and promptly a clause was added, making members of Congress and officers of the Union ineligible to be Electors. The *animus* of the Convention upon the subject of Congressional and official interference is hereby clearly shown, and it will be found to have a further issue subsequently. From the beginning to the end, this was regarded as an essential feature of the System.

On the 6th of August the committee reported a constitution, which provided for an election of a President by Congress. It contains no mention of a Vice President, and the Senate were to "choose their own President." The committee therefore rejected the plan approved by the Convention, because it provided for the appointment of the Electors by the State Legislatures. An Electoral System was undoubtedly acceptable, but, left in that shape, it would have involved contests in the several States, which would divide their Legislatures upon national questions. They had no satisfactory substitute to offer, and perforce fell back on the original Congressional plan.

The proposition, August 24, to substitute a plan of electing by the people was another move towards a popular choice, and its reason was explained by Gouverneur Morris, as quoted,* that even that was preferable to the Congressional mode; but it was again rejected. The naked proposition of an election by Electors was disapproved, because it was an indefinite way of stating the question.

The Convention were resolved to have an Electoral System, not-

* Chapter ii., page 32.

withstanding the report of the committee; but they saw the necessity of submitting the whole question to a competent sub-committee, who would mature a plan free from the defects already pointed out, and present it in a comprehensive shape. This was duly provided for on the 31st of August, when they were discussing Article XXIII. of the draft, which was a clause providing for the first proceedings under the new System.

It is noteworthy, that the Framers were fully cognizant of the way to change the two Houses into a convention, or joint meeting,* and they provided specially for one at this stage of the question by adopting the provision, "He shall be elected by joint ballot by the Legislature." Since they saw the propriety of a joint action in an election and the necessity of providing for it categorically, and since they did not subsequently provide for it in the Electoral System, it is clear that they did not intend to authorize it.

Here the two Houses were to elect by voting directly, and, under the present custom, they elect by voting on the returns. It is obvious from the foregoing, that, if the Convention had desired them to join in a canvass, they would have provided for it. It would have been an absurdity to prescribe an election by two separate and independent organizations, and the Convention recognized the fact; it would have been just as absurd to provide for a canvass of the votes by two equal and independent bodies, and the Convention knew that as well. Their well-considered and intelligent action here, and the total absence of any similar action in framing the Electoral System a few days afterwards, argues conclusively that their design was to not permit the Houses to canvass. Indeed they expressed that intent in language which cannot be intelligently questioned; here the Houses were to elect, but there they were only to witness.

THE ELECTORAL SYSTEM PRESENTED.

September 4, the "Grand Committee," consisting of eleven of the most distinguished members of the Convention, reported a complete Electoral System.†

At this point it may be well to call attention again to the fact, that

* Chapter ix., page 200.

† Appendix, "Journal of the Convention," September 4.

the System was a carefully wrought scheme, and not the piece of patch-work which some of its commentators have apparently considered it, with an absent stitch here and a gaping hole there. It grew up slowly and steadily into its present shape, and was a perfect scheme when presented, every phrase being exact and every word significant.

An examination of it at this period, when just issued from the chrysalis, will enlighten us as to the intent of those clauses which underwent no further transformation.

1. We note a fusion of every plan hitherto proposed, blending and counterbalancing their conflicting parts, so that every one was satisfied with its leading features, and the Convention accepted it unanimously. Regard being had to the difficulty of harmonizing such widely diverging views, and the novelty of the unique invention, it must be esteemed an admirable piece of workmanship.

2. The precise meaning of its provisions is gathered by a comparison of former propositions with those now before us. The three leading ideas of a popular, congressional, and pure electoral election are harmonized; the people are represented through their State Legislatures, ~~The Electors are independent and unpledged,~~ and one branch of Congress may elect the President in certain contingencies.

3. State autonomy is preserved, by providing that the States appoint the Electors; and the additional privilege is accorded that neither the United States, nor any State or party, and not even the people of the whole country, shall interfere with the appointment, by the clause empowering the State Legislatures to prescribe its manner. It is clear now that both State appointment and Legislative supervision were granted as privileges of the States, and not as duties to the nation.*

4. State equality was maintained by giving each State two representatives, and an additional number proportioned to the population. This was imperative at a time when each member of the Confederation was sovereign and independent, but is unimportant now, so far as national interests are concerned, and has the radical fault of providing a minority President at times.†

5. The Electors are made as large and as respectable a body as Congress, and exactly co-ordinate with them in authority. Congress make

* Chapter iii., page 44.

† Chapter xiv., "Elections and Electors."

the laws, and the Electors make the Executive of the laws, who, in conjunction with Congress, appoints the Judges to interpret them.*

6. By the 6th section most of the safeguards already expounded are thrown round the purity and independence of the Electoral Colleges. Another, prohibiting Congressmen and United States officials from being and acting as Electors, was subsequently added. These are all a *sine qua non* of the scheme, as contemplated and intended by the Fathers, the System being emasculated by a neglect of any of them.

7. A "Vice President" for the first time appears in the Constitution, and it is noteworthy that he is the immediate offspring of the Electoral System. Hitherto no one had suggested such an officer, and, in fact, he is not an essential feature of the Government; the Executive power was then and is now vested in one person, and must properly so remain; Congress had already been empowered to regulate the succession to the Presidency, and each House had been directed to elect their own presiding officers; therefore there had been no necessity of instituting a Vice President, and no duties for him to perform. The conclusion is inevitable, that he was conceived and devised in order to provide a suitable official to take charge of the electoral votes, to protect them from Congressional and Governmental interference, and, as the national ministerial agent, to open them to public view. For this reason he was kept entirely free from all other duties and political complications, except only to preside over the Senate.

8. This transpires further from the function here assigned him, concurrently with the creation of his office. He was to receive the lawful lists, without oversight of any kind, and open the votes before the Senate, who, if the election failed, were then to complete it. There could be no stronger argument in favor of his official duty to disclose the legal votes, than the fact of his contemporaneous creation with the System and the nature of the business assigned him.

9. This is proven further by the discussion which ensued, and which never touched upon the question of a Senatorial canvass of the votes. The opinions of the Convention immediately divided on the presentation of the 7th clause, which provided for the secondary election of both the President and Vice President by the Senate. Politicians were already jealous of the proposed inequality of Senate and House, and

* Chapter v., page 115.

demanded that the election of these officers should be divided between them; yet they made no exception whatever to the provision, "The President of the Senate shall in that House open all the certificates." If Opening the Certificates means only "breaking the seals," and devolves the power of canvassing on Congress to-day, it must have devolved it on the Senate in 1787; and the Senate would then have been invested with a prerogative superior to the House,—not once in a century, as in the case of the secondary choice, but every four years. The fact that not an objection was made is proof that the Convention never designed to grant any Congressional power by that phrase.

10. Prior to this it had been prescribed, "The Senate shall choose their own President"; and now, it is provided, "The Vice President shall be *ex-officio* President of the Senate." He was in that House, but not a part of it, and therefore, when he opened the certificates "in that House," the duty was that of a national agent, who was prohibited from taking any part in their transactions. When the Fathers at this same time provided that the Vice President "shall have no vote unless they be equally divided," they meant to so separate him from the Senate, that, when he came to open the certificates in that body, he should act as the agent of the nation and not as a member of the Senate. By limiting him to that one act of Senatorial service, they excluded any other function which he might execute in that House from being regarded as part of their proceedings.

11. His electoral function was the Opening of the Certificates "in that House." The Vice President was to be, not a part of the Executive branch of the Government, but the presiding officer of the Senate; therefore, and because the former might be out of existence, whilst the latter might always be *in esse*, the "President of the Senate" was nominated. Wherefore the spirit and substance of this provision was that the President of the Senate should disclose the electoral votes "*in the presence of that House*," publicly witnessing the proceedings, in order that they might testify to the result, and be advised when it became their duty to elect a President.

12. "The votes shall then and there be counted." The word "there" means "in that place," and has direct reference to the preceding phrase, "in that House." "House" is a technical term, not equivalent to "Senate," but meaning the "organized body." Therefore, while "there" cannot be appropriately used to refer to "Senate," it

can refer to "that body," "that House." So that this provision contains within itself the proof that the Senate were not to be present in their constitutional character of a Legislature, but simply as a convenient "body" organized under their own rules, as witnesses, with no duty except to count, compute, or "count over" the votes declared by the Vice President.

13. It was not provided that he should "lay them before the Senate," or that they should "examine" or "canvass" the certificates—powers well known, and in common use under similar circumstances,* but he was to open the certificates and the votes were "then and there" to be counted, by which the only two things permissible were opening and counting the electoral votes. It is obvious that the phrase "in that House" was interjected to give a convenient and judicious publicity to these proceedings; and that if the Senate were to have had control of his actions, the language would have directed them to exercise it by the customary formula, and a "Vice President" would probably not have been created.

AMENDMENT AND ACCEPTANCE.

On the 5th of September debate began on the Electoral System, and it underwent certain modifications in the next few days. The cases pertinent to this examination are as follows:

1. From the record it is apparent that the friends of the prescribed system of a primary election by Congress made a sally upon the electoral plan, but were speedily routed.†
2. Five attempts were made at an amendment of the provision fixing the President's election by "a majority of the whole number of Electors," only one of which was successful. Mr. Dickinson moved the addition of "the word 'appointed,' in order to remove ambiguity from the intention of this clause," and the motion was adopted.‡
3. The ineligibility of Senators, Representatives, and officials of the United States is again specifically provided for, as it was in the former plan.
4. The fact that the word "immediately" was interjected at this stage

* Chapter x., pages 215, 216, 217, and 218.

† Appendix, "Journal of the Convention," September 5 to 17.

‡ Chapter ix., p. 210.

of the proceedings indicates its special and peremptory significance. The provision ran, "The House shall choose the President," and it was amended to "the House shall *immediately* choose the President."

5. In amending the 7th clause the first motion made was to insert "Legislature" in the place of "Senate." The amended clause would have read, "The President of the Senate shall, in the Legislature, open all the certificates," etc. Here is confirmation of our recent position that "in that House" referred to the Senate as witnesses; for, since "in that House" could only confer a supervisory power on the Senate, because their presiding officer was executing the transaction, and since "in the Legislature" could not confer an authority over the Vice President because he was not their presiding officer, and since the substitute was obviously offered not to change the function but only the body before whom it was to be executed, therefore it was not designed that he should act as a presiding officer in the first instance; hence he was a national agent and they were witnesses.

6. The question as to which of the two Houses should elect the President in case of failure by the Electors was extensively discussed. The proposition presented was opposed on the ground that the power of the Senate would be too great, and the opportunities for intrigue too many, to permit of such active participation in an election; it was sustained by the argument that the Senate was the smaller body of the two, and therefore less liable to intrigue than either the House or the Congress. On the other hand it was shown that the House, since it was changed more frequently, and came more directly from the people, would therefore be the purer and the proper body to elect a President for the nation; and furthermore, it could be provided that the Representatives should vote by States. And finally; as it was advisable to make the Senate a court of impeachment, any authority over the selection of a President by them was shown to be incompatible with this judicial duty. This debate determined the Convention, and they perceived the necessity of preventing all interference with the President's election by the Senate, and therefore devolved the power on the House. How absurdly inconsistent, if at the same time they designed them to take part in a political canvass of the votes!

7. The meaning of "in that House" being fairly demonstrated to be in "the presence of that House," we are not unprepared for the next amendment, which was "to insert 'in the presence of the Senate

and House of Representatives' after the word 'counted.' " It was accepted. This is a demonstration of the fact that the Convention designed that both Opening and Counting should be executed before the Houses as witnesses.

8. The clause, as amended, ran thus:

"The President of the Senate shall, in that House, open all the certificates; and the votes shall then and there be counted, in the presence of the Senate and House of Representatives."

When it was officially read to the Convention, it is reported as follows:

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

There are then four changes made in the original, about which no explanation is given. They were made in regular session, and indubitably with the knowledge and consent of the Convention, and it is therefore in point to inquire their significance.

a. "In that House" is extracted, and the cause of the change is patent. The amendment heretofore quoted was proposed as a substitute, and, being accepted, it expelled the original phrase.

b. "And there" is dropped out. Referring to an organized body, as explained,* it was superfluous when "Senate and House of Representatives" were substituted for "that House." Our former conclusion regarding the force of "there" is thus sustained.

c. The semicolon is changed to a comma. There is no other explanation of this than that it was made in order to more effectually link together the Opening and Counting as acts to be done "then," that is, "at the same time." Former conclusions in regard to the force and effect of "then" are thus substantiated.†

d. "In the presence of," etc., is transposed to the place formerly occupied by "in that House." This is natural, since it was proposed as a substitute; but it no longer is affixed to Counting, and seems to leave that as an independent act to be done. The reason would seem to be this: after "in that House" was stricken out the clause would read,—

"The President of the Senate shall open the certificates, and the

* Page 234.

† Chapter viii., page 177.

votes shall then be counted in the presence of the Senate and House of Representatives."

The result would be that the President of the Senate would have unlimited authority over the Opening of the Certificates, and, since we have seen that this function was the most important and momentous in the whole transaction of an election, such an authority was inadmissible.* Therefore the transposition was made, but it does not prove that thereby the Counting was not to be done in their presence; it was made, not to release the Counting, but to limit the Opening. In any event, Counting, being computation, was to be executed by both the President of the Senate and the Houses, the former officially and the latter as witnesses, who thus ascertained his correctness and their own right to make the secondary election.

September 8 the Convention appointed a committee, whose duty it was "to revise the style and arrange the articles agreed to by the House."

This Committee reported back the revised draft of the Constitution four days afterwards, and it appears that they had made only verbal changes in the electoral section, strengthening it, in no case altering the phraseology, and but in one minor particular omitting a useless provision, to wit:

"And the manner of certifying and transmitting their votes," which had concluded the following grant, in the draft of September 4: "The Legislature may determine the time of choosing and assembling the electors." †

That the committee would omit this provision without authority is unlikely, and it is therefore presumable that they had it, though when and on what grounds is not stated. The effect of the clause was to make the Electors subject to Congress after they had cast their votes. But the Constitution had made them so subject by directing them how and when to dispose of their votes; their relation to the State is ended when the appointments are made, their duty is completed by voting as their consciences dictate, and their relation to the United States concurrently begins. Being national officers, engaged in the transaction of national business, they are subject to the laws of Congress under Art. I., Sec. VIII., Clause 18.

* Chapter vii., page 153.

† Appendix, "Journal of the Convention," September 4 and 8.

Doubtless this was recognized by the committee and the Convention, and the clause accordingly extracted. It accords with the fundamental principles of the art of framing a constitution, that its provisions be made concise in phraseology and general in application, leaving the future to determine what laws are necessary to carry them into execution.

From the 14th to the 17th of September they "read, debated by paragraphs, amended and agreed to" the Constitution, leaving the Electoral System still intact. It was one of the most carefully considered parts of the instrument, and it issued from their hands as nearly a perfect system as it was possible to make it under the circumstances. Had Congress followed its directions strictly, had the XII. Amendment not impaired it, and had the people not disregarded its spirit by instituting nominating conventions and pledging the Electors, it might still be the ornament and crown of our republican institutions.

THE RESOLUTION OF 1787.

Concurrently with the completion of the Constitution, a letter was prepared transmitting it to the American Congress, and a Resolution passed, which was to accompany it.

This Resolution had been Article XXIII. of the draft presented on the 6th of August,* and was designed to start the wheels of government. It remained in the instrument until September 13, and was discussed and amended with the other articles. At that date it was determined to omit it from the Constitution, since it would be of temporary use only, and remit it to the people, together with the former, as a concurrent act of the Convention, for ratification.

On September 17 it was passed unanimously by the Convention immediately after the signing of the Constitution; † it was sent to Congress with the Constitution, and by them transmitted to the several States; ‡ the two documents were considered and debated side by side in the State conventions, and not one word was ever said in criticism of the Resolution; it was ratified together with the Constitution by all the consenting States, and under it, finally, the first Electors were

* Appendix, "Journal of the Convention," August 6.

† Appendix, "Resolution of 1787."

‡ Appendix, "Resolutions of 1788."

appointed and the first President and Vice President elected. We are therefore justified in saying that it is of equal force with the Constitution, as expressing the intent of the Framers of that instrument; and that it authoritatively declares more, for it expresses the understanding and intent of the people of every State which ratified it.

The Resolution contains the following language:

"*Resolved*, That the Senators and Representatives should convene at the time and place assigned; that the Senators should appoint a President of the Senate for the sole purpose of receiving, opening and counting the votes for President."

It is clear, first, that this Resolution is an expression of the Convention's opinion; second, the command of the States to Congress, precisely as was the Constitution; and, third, that the action on it by the 1st Congress emphasizes their construction of it.

It is obvious also that it interprets the meaning of the Constitution as to "receiving, opening and counting" the electoral votes, on the principle that when there may be doubt as to one part of an instrument, or one law, another part, or a concurrent law, may explain it and fix its true meaning. The Supreme Court goes farther than this, 1 Cranch, 299, as follows:

"A contemporary exposition of the Constitution, practiced and acquiesced in for a period of years, fixes the construction, and the Court will not shake nor control it."

It transpires then, from an examination of the Resolution, that the President of the Senate was intended "to receive, open, and count the votes"; and it will hereafter appear that this construction of the Framers of the Constitution was also the construction of the 1st Congress, and that it was unquestioningly acquiesced in and practiced for at least the space of thirty years.*

It has been asserted, and by distinguished lawyers and statesmen, that this Resolution "imparted no power," that "it did not even propose that the counting should take place in the presence of the two Houses," that "it did not profess to conform to the models of the Constitution," and that it was simply designed as an instruction to the Senate to "organize" for the sole purposes expressed in the Resolution. This construction is so shallow that a very little examination will overturn it.

* Chapter xiii., "1789 to 1821."

1. The fact that the Convention framed the Resolution proves that they deemed it necessary, and the facts that the State conventions ratified and acquiesced in it, and that Congress afterwards acted on it, show that they approved of the Convention's wisdom. We shall see directly that it was eminently wise and very necessary.

2. To allege that it does not conform to the Constitution, when it was made by the Framers of the Constitution for the express purpose of introducing the government which they had founded, is utterly untenable. The Fathers were not so inconsistent as these statesmen would have us believe.

3. The Resolution did not declare that the Counting was to be done in the presence of the Senate and House, because the Constitution had already specifically prescribed this. The fact of this omission is an argument in itself, for it shows clearly that the action indicated was extraordinary and to be performed by the Senators alone, which could not and would not have been the case if that action was the Opening and Counting of the Votes.

4. In the preceding line the Resolution carefully prescribes the attendance of both the Senate and House, and for what, if not to execute the Constitution? That instrument had provided that they should be there as witnesses to certain things, and the Resolution brings them there, as the Act of 1792 afterwards does, showing thus its faithful adherence to the prescribed forms of the law. Being there, their first business was to take their part at the election of a President, and therefore they were summoned, and required to do it without extra orders.

5. To assert that the Resolution imparts no power is a curious case of obliquity in view of the fact, that it directs the Secretary of the old Congress to "receive the votes." This was the constitutional duty of the Vice President; but there was no Vice President in office yet, and therefore the Resolution appoints another and temporary Receiver.

6. Note the fact also that the Senators were to appoint "a President of the Senate." There is under the Constitution but one person who can hold that office,—the Vice President of the United States. The Senate are empowered to make their own rules, and by rule they may provide for "a President *pro tempore*," a presiding officer, to execute their rules; but they cannot appoint or create a "President of the Senate" by any constitutional means. This is a distinction with a

wide difference,—the one being a constitutional officer, and the other a parliamentary officer. To show how the 1st Congress regarded this President of the Senate, John Langdon, who was appointed according to the Resolution, is styled in the "Annals of Congress," April 20, 1789, "the Vice President *pro tempore*." Let us not forget that the President of the Senate was not made the successor of the Vice President until 1792; therefore when Langdon was styled "the Vice President *pro tempore*," in 1789, he was recognized, under the Resolution, as *ex officio* the temporary incumbent of that office, by virtue of his single service of "receiving, opening, and counting" those votes,—the constitutionally prescribed function of a Vice President.

7. That the Senate were not required simply to "organize" is obvious from the fact that the word "Senate," the technical term, is not used by the Resolution. It provides that the "Senators shall appoint a President of the Senate," and obviously means this:—the Vice President is now elected, but is not declared, and therefore there is no President of the Senate, who, the Constitution declares, shall open the certificates; in order to obey the very letter of the law, and to show future generations what pre-eminent importance is attached to this duty, it is prescribed that in this case, and for this sole purpose, the Senators shall be empowered to appoint a President. In the next line, the votes being then announced and the Vice President declared, the Senators and Representatives are technically spoken of as "the Congress."

8. When the Resolution of 1787 was first presented to the Convention it was as Article XXIII. of the Constitution, and it read as follows:—"To introduce this government it is the opinion of this Convention that the members of the Legislature should, as soon as may be after their meeting, choose the President of the United States." They were already empowered to organize for legislative purposes and to form a joint meeting for the purpose above; therefore all reference to organization was omitted, and the resolution simply directed them to choose the President *at once*. So of the revised Resolution of September 17, it must be held that organization was not its object, but an express direction not covered by the Constitution. And this construction is substantiated by its last direction, which is that Congress, who were empowered to execute the Constitution, should, as soon as the votes were counted, execute it *immediately*; whilst the concurrent

resolution embodied specific instructions as to the method of laying the Constitution before the State conventions, and procuring its ratification and publication,—all new transactions and unprovided for in any other way.

9. If the Senate were to count the votes, why does it not say, The Senate shall receive, open, and count the votes; or, The Senate shall organize for the sole purpose of counting the votes? On the contrary the only command is that "the Senators shall appoint," and their action at this juncture is limited to this one duty.

10. The Resolution required the election of a President "for the sole purpose of receiving, opening, and counting the votes." These were constitutional duties, and were already specifically provided for; consequently it was necessary that they should be executed without any resolution, the Constitution being ratified and now in force. This therefore is not a direction to the President of the Senate, to perform certain acts which he was already empowered to perform, but a direction to the Senators to do a certain thing which they were not empowered to do,—namely, to appoint a President. At the same time it is descriptive of his duties, and so far interprets any doubtful parts of the original instrument.

11. If the Resolution had been intended to direct the Senate to receive, open, and count the votes, it would have read, The Senators shall appoint a President of the Senate "solely" for the purpose, etc. The Framers were exceptionally good grammarians, and only thus would they have limited the Senate's unusual appointment to that sole time and for that sole purpose; that is, by using an adverb they would have empowered the Senate to appoint a President solely, or only, in order that they might count the votes.

12. It is utterly unreasonable however to suppose that the Convention would have deemed it necessary to direct them to appoint a President, if they were already empowered to count the votes.

13. Furthermore, the Constitution expressly provides that the Senate "shall choose a President *pro tempore* in the absence of the Vice President." To authorize them to appoint a President when they were already amply empowered, if only an organization were in view, would have been an absurdity, which the Framers were not nearly so apt to commit as are some of their critics.

14. If the Resolution was designed to empower the Senate to or-

ganize in order to count the votes, where are the equal privileges of the House? and why not provide for their organization? In any point of view the claim, that the Resolution does not absolutely exclude the participation of the Houses in the count, is untenable.

15. In fact, the appointment was not to be made solely for that purpose, but a President was to be appointed for that sole purpose,—for that only, or one, purpose, and not for any other; and the "Annals of Congress" show that that is the only official duty he performed.

16. "Receiving, opening, and counting" are here coupled together. Now it is clear that the first two duties belong only to the President of the Senate, the whole dispute being in regard to the third. If therefore they are specified here as a "sole purpose," it is evident that they are a series of concurrent acts to be performed by the same party; the Senate could not have claimed the first two, and the phraseology prohibited them from claiming the third.

17. Had the phrase run, The Senators shall appoint a President for the sole purpose of receiving and opening the certificates, and the votes shall then be counted,—there would have been no doubt of its exact compliance with the Constitution; and now, when it adds Counting to Receiving and Opening, as the Vice President's function, it must be held as cumulative evidence contributed to that heretofore adduced.

18. And finally, when the Resolution was executed in 1789, and when John Langdon had been appointed President and the votes had been opened and counted, he sent George Washington and John Adams certificates, notifying them of their election, in which he categorically affirmed that he, and not Congress, had "received, opened, and counted" the votes.*

* Appendix, "Annals of Congress," 1789.

CHAPTER XII.

ACTS, BILLS, AND AMENDMENTS.

"However combinations may now and then answer popular ends, they are likely, in the course of time and things, to become potent engines by which cunning, ambitious and unprincipled men will be enabled to subvert the power of the people, and to usurp for themselves the reins of government."—GEORGE WASHINGTON.

ELECTORAL LAWS.

THE business of Congress is to make national laws executory of the Constitution, and accordingly the concluding provision of the Resolution of 1787 is, "that after he (the President) shall be chosen, the Congress, together with the President, should without delay proceed to execute the Constitution."

Congress therefore entered upon the performance of their duties immediately after the establishment of the government in 1789, and, since that time, have passed two general Acts executory of the Electoral System, one in 1792 and one in 1845. To these may be added their proposal to the States of the XII. Amendment in 1803, an Act supplementary to that of 1792 enforcing the XII. Amendment, a special Act in 1865 excluding the returns of eleven States, and the special Act of 1877, establishing the "Electoral Commission." They have also originated and discussed a number of Bills and Amendments pertaining to this subject, which are of much interest as evidence of their desires and convictions.

The Act approved March 1, 1792, by George Washington is the most general, detailed, and specific of the two national laws; it was framed, after much consideration and discussion, to execute every provision of the System over which Congress then deemed that they should exercise authority; and, with one exception, it was intended to and did cover every power which the Constitution had granted them. The exception was, that they did not assume their right of

prescribing "the day on which the Electors shall be chosen," and that right was not exercised until 1845; but the subject was debated, and the assumption of the power deprecated on the ground that, if possible, the States should be free to execute that part of the Constitution themselves, and with the expectation that they would all select the same day, or otherwise provide so that no evil should ensue. The enactment of such a law was at the discretion of Congress, and they resolved not to exercise the power until circumstances proved it to be necessary;—so averse were the early Legislatures to interfere with the powers and privileges of the States.

It must be observed that Congress, for a number of years after the adoption of the Constitution, contained members of the Federal Convention; and that this was particularly the case from 1789 to 1797, and less so from that date to 1805. Therefore it may be agreed that the Framers of the Electoral System passed the first law in execution of it.

On the 28th and 30th days of April, 1790, the Houses appointed a joint committee to consider the succession to the Presidency and other matters relating to the electoral clauses. May 14 the committee reported, recommending the passage of "a law, or laws, determining the time when the Electors shall be chosen; the day on which they shall give their votes; for declaring what officer shall, in case of vacancy, act as President; for assigning a public office where the lists shall be deposited, and for directing the mode in which such lists shall be transmitted."

It is apparent that the committee have covered every special and one general provision authorizing Congressional action. By Art. II., Sec. I., Clause 4, they are given the right to determine the time of choosing Electors and the day on which the votes shall be cast; that they quote and recommend. By Clause 6 they are empowered to provide for the case of certain vacancies in the office of President and Vice President; that they refer to and recommend. These are all the specific provisions. By Art. I., Sec. VIII., Clause 18, they have power to frame all laws "necessary and proper for carrying into execution all powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." Under that grant they recommend a law declaring how the United States shall keep the lists, in case of the absence of a President of the Senate, and how the

Electors shall transmit the lists. But not a word is suggested as to a law prescribing a mode in which the Legislature, one branch of the "Government," shall canvass the votes! This is very significant. Were the power of canvassing vested in Congress, a law must be framed to enable these two independent bodies to do it, for a concurrent resolution will not answer; and yet the Fathers are absolutely silent on that head. If the power be vested in the Vice President as a national agent, then no law would be required; being a ministerial officer, he canvasses the votes agreeably to the Constitution and the laws; and only a concurrent resolution, a rule of action for the two Houses, would be requisite when the time came for them to act as witnesses. The committee therefore did not recommend a provision covering the receiving, opening, and counting of the votes, whilst each House did pass just such a resolution in 1793.*

Further, the committee did not recommend a law prescribing the method of appointing Electors by the States, or the duties of the Electors in choosing a President, or any of the duties of the Vice President, or concerning the limitations which the organic law has laid upon the eligibility of persons to be Electors and President. These are all significant omissions, and they mean that it was the settled opinion in 1792 that the lawful agent should himself interpret and execute the Constitution as to these particulars.

THE BILL OF 1790.

December 20, 1790, a Bill, covering all the points recommended, was laid before Congress.

During this period the Senate sat with closed doors, and there is therefore no record of the debate on it in that House. In January, 1791, the House of Representatives took it up, and it was thoroughly discussed. Some of these debates appear in the "Annals of Congress," though, of course, in outline chiefly. It is obvious from the nature of the Bill, as above set forth, that very few of the questions of importance in our examination were touched upon. The chief question was as to who should succeed to the office of President, in case of its vacancy; and the issue was a provision that, first, the President of the Senate *pro tempore*, and, second, the Speaker of the House, should fill

* Chapter xiii., "1793."

the office.' With this part of the debate we need not now concern ourselves.*

At various times during 1791 and 1792 the discussion and amendment of the Bill progressed, and some few remarks and statements were made, which may be noticed. The "Annals of Congress" have the following record, under date of January 14, 1791 :

"The next clause respects the time when the votes shall be counted. Some of the members supposed that the votes should be counted by the old Congress. Mr. Benson (one of the committee) said, 'If the votes should be counted by the new Congress, they may be counted by men chosen with a special reference to influence finally in the election.' No alteration was made in this clause."

This is the only record on the subject, and the only suggestion of a Congressional canvass in the whole range of the "Annals" for thirty years, with the exception of a remark about "counting over" the votes let fall by Charles Pinckney in 1800, to be hereafter noticed, which is of no importance. But the above seems to be an express admission of the power, and a power too which, it is intimated, may be abused.

However, it is impossible at this date to ascertain the language of the provision under discussion. The original Bill in the House may have contained a clause, prescribing the mode of a Congressional canvass ; or, there may have been an amendment to that effect added to it, under the impression on the part of certain members that they had the power to canvass. Of course an expression of opinion on the subject is of no value, nor even the vote of the House, if rescinded by the Senate, wherein the Framers of the Constitution were then chiefly represented. We can only surmise as to the occasion of that acknowledgment, and dismiss it on the ground that it does not accord with the completed Bill, nor with any record on the subject for years. If it be regarded as an argument in favor of the right of the Houses to canvass the votes (their power to count, their duty to do so indeed, as witnesses, is conceded), it is one only amid scores of others, militating directly against such right. It is possible that the above was the opinion of certain members, who were of course liable to error, as the rest of humanity is.

Nearly a year afterwards, December 22, 1791, the Bill came back

* Chapter xiv., "Vacancies and Terms."

from the Senate; therefore it must have been amended by them. The following record appears:

"The clause which makes it the duty of the Executive of the several States to cause the names of the Electors to be certified, was objected to. Mr. Clark said, it appeared to him that the committee was creating difficulties where none before existed. He observed that the choosing of these Electors was a privilege conferred on the people, and that this was merely pointing out the mode of exercising the privilege."

It thus appears that the committee were the objectors to a very necessary and perfectly legal provision, viz.: the certification to the Electors by the authorities of the States.* If therefore they were so ignorant in this case, less value attaches to Mr. Benson's opinion, above expressed, as to the power of Congress to canvass the votes; and the probabilities now are that the committee had a provision in the original draft of the Bill referring to a Congressional canvass, which the Senate promptly struck out.

Mr. Clark's reference to the choice of the Electors being a "privilege" may be noted in passing; it is an important element, as heretofore discussed, in determining the extent of a State's authority over her own appointments.†

January 13, 1792, the tenure of the Electors was discussed, and it was concluded that they are *functus officio* as soon as their votes are cast. The following suggestion was made:

"When amendments to the Constitution come to be thought of, perhaps it would be proper to provide for this case by a special clause in it, empowering the Electors, who had chosen the President and Vice President, in case of a vacancy in these offices, to meet again and make another choice."

January 14, concerning the debate upon that part of the Bill which referred to the appointment of Electors, is the following record:

"Mr. Madison said a question arose here, which was, Whether the power of Congress extends to determining the manner of choosing, by virtue of possessing the power of determining the time of their being chosen?"

He then advocated the insertion of the letter of the Constitution,

* Pages 54, 238 and 252.

† Chapter iii., page 44.

viz., "in such manner as the Legislature thereof may direct"; and Congress finally concluded not even to insert that, lest it should be subsequently held that this law was designed to claim authority over the manner of the State appointments.

It is probable that the Bill included a reference to an "election" of the Electors, or to a statute by the State Legislatures, and that James Madison objected to it. The foregoing remarks can certainly not be held to mean that there was any question in his own mind upon this point, it being clearly beyond the authority of Congress to exercise supervision over either the fact or the manner of the appointments. Madison knew this, and designed expressing his opinion to that effect upon the question which had been raised; or, he possibly raised it himself, in order that he might thus record his frank opinion. His action is interesting, because it bears exactly on the question since then raised, whether appointments are invalid if not provided for by the Legislatures, and decides it adversely.*

THE ACT OF 1792.

The Act† bears evidence of the care with which its various features were constructed, and the exact compliance with the fundamental law which Congress had proposed for themselves, as urged by Mr. Madison.

Sec. I. prescribes the manner of ascertaining the electoral representation of a State.

Descanting upon the proviso attached to it, February 14, Mr. Murray remarked that the provision of the Constitution anticipated a uniform and fair executory law, so that the people might have no difficulty in choosing correctly and exactly, and added:

"A disagreement might happen between the Houses, so that no apportionment would be made. In this situation the Executive would be left at the mercy of the Houses, and the order of things violently deranged. If they (the States) acted without such a rule, then there might appear before the tribunal of the public two Presidents, or two men of great power claiming the Presidency of America. This would be an evil of great and alarming size, and one which he so much deplored that he willingly yielded to the proviso, which he thought

* Chapter xiii., "1797," and Chapter iii., page 63.

† Appendix, "Act of 1792."

would tend to lessen the opportunity by which designing men could effect it."

When such foresight is exhibited in framing a law, is it reasonable to suppose that these same men were blind to the much greater and then impeding evil of permitting two Houses to canvass the votes every four years with no law to guide them? The question of their abuse of the power had been debated, as we have seen, and yet nothing is done to prevent an arbitrary and fraudulent Count, to which the foregoing language is much more applicable than the matter to which it was applied: "in this situation the Executive would be left at the mercy of the Houses, and the order of things violently deranged." The fact that no provision was at this time framed, regulative of this asserted power, is the strongest proof that Congress did not regard it as vested in them, whatever may have been the opinion of some of their members.

Sec. II. provides, in regard to the duties of the Electors, as follows: "The Electors shall meet and give their votes on the said first Wednesday in December"; and they "shall make and sign three certificates of all the votes by them given, and shall seal up the same, certifying on each that a list of the votes for such State is contained therein."

Thus "the day on which they shall give their votes" is prescribed, that being also at the discretion of Congress, but exercised because Electors are officers of the United States. The evidence of the validity of the lists is left to their own authentication, so far as their external appearance is concerned. This, as we have seen, was specially prescribed in order that the President of the Senate may officially receive them according to the names of the Electors attached; and it particularly recognizes "receiving" as an official function, and not as a simple "taking."*

The direction that the lists must be delivered by "the first Wednesday in January" was made in the days of stage coaches, and is too far removed, in this age of railways, from the date of voting. It would therefore be wisdom to change it to the third Wednesday in December, in execution of the spirit of the System, which requires a prompt ascertainment of the President-elect.†

Sec. III. is the following important provision:

* Chapter vi., page 135.

† Chapter xiv., "A New Law," sec. iii. 8.

"The Executive authority of each State shall cause three lists of the names of the Electors of such State to be made and certified, and to be delivered to the Electors on or before the said first Wednesday in December; and the said Electors shall annex one of the said lists to each of the lists of their votes."

Remarking upon this, one of the committee said: "The certificate of the Executive of the State is provided for the purpose of advising Congress that they were Electors, and (the certificate) of themselves for the purpose of authenticating their exact vote."

It is apparent from each of the foregoing quotations that the only purpose of the Law of 1792, in requiring the Governor's certificate, is the authentication of certain names as the names of the State's appointed Electors; these names are also signed to the lists, and the votes are accepted by the President of the Senate as the *de jure* votes of the State's *prima facie* Electors, and witnessed as well by the Congressional tellers who examine them. In other words, the Governor's certificate is the legal evidence of the appointment.

This certificate is "to be delivered to the Electors on or before the said first Wednesday in December." Therefore, in case of a change of Governors and the presentation of two certificates, that certificate only is legal which was given by the Governor in office on or before said day, and only the Electors having such certificate must be recognized.

Furthermore, the prescription of those two requisites was designed to be legal evidence, and the only evidence necessary in ascertaining the persons appointed. So long, therefore, as the law stands un-repealed, it concludes the President of the Senate, Congress, the Government, and the Nation from requiring, seeking, or accepting other evidence.*

Applying these principles to the canvass of 1877, it is apparent that the "Electoral Commission" violated the law in requiring, as proof of the lawful Electors, a certification "in and according to the determination and declaration of their appointment by the Board of State Canvassers"; and, in rejecting the vote of one of the Oregon Electors certified by the Governor, it is equally clear that they again violated the law.†

* Chapter iii., page 54.

† Appendix, "Annals of Congress," 1877.

The reason why this provision was framed is patent. Congress did not recognize any authority on the part of the national canvassers to enter into the details of the appointments; those were matters pertaining exclusively to the States, under specific grant of plenary power by the Constitution. And it is noticeable that no certification of Legislative regulation is required; nothing is required but "a certified list of the names of the Electors." Thus the meaning of Madison's language is practically illustrated.

This certified list of their names legally accredits them to the State, but it does not constitute them Electors as against an express provision of the Constitution. Consequently, if the name of a Senator, Representative, or person holding an office of profit or trust under the United States, be found in the certificate, he is not a lawful Elector of the United States, and his vote must be rejected. So, also, if he votes on a day not appointed, or for a person not eligible to the Presidency.

The certificate of the Elector to his vote is the appointed evidence that he cast the vote, but it is not proof that the vote is valid; and so the certificate of the State is the prescribed evidence that the State appointed the person, but it is not proof that he is a valid Elector. The validity in both these cases must be determined by their compliance with the Constitution, as shown by the facts which the certificates recite.

A legal Elector is one who is appointed by a State agreeably to the laws of the United States, and a legal vote is the vote of such an Elector cast according to law.

Sec. IV. endeavors to prevent a fraudulent or accidental failure of delivery, and is judicious in policy, though the method laid down may now be regarded as antiquated. The votes of the Electors, once cast, belong to the United States, and it is the duty of their agent to use every reasonable endeavor to procure them by the appointed time.*

The principle is hereby clearly recognized, and it has its foundation in reason, that the President of the Senate is not to be held responsible for the production of lists which he has not received. It is recognized and emphasized also in Sec. V. No way is provided for "receiving" after the day appointed for "opening," which is rational and just. The prime object of all these periods of time, as they relate

* Chapter xiv., "A New Law," sec. v.

to one another, is to procure the prompt disclosure of the votes and declaration of the President-elect.

Sec. V. is as follows :

" Congress shall be in session on the second Wednesday in February, 1793, and on the second Wednesday in February succeeding every meeting of the Electors ; and the said certificates, or so many of them as shall have been received, shall then be opened, the votes counted, and the persons, who shall fill the offices of President and Vice President, ascertained and declared agreeably to the Constitution."

It may be observed of the day fixed here, the second Wednesday in February, that it is too far removed from the day of receiving the votes ; in fact, it should be the day appointed for their reception. There is no reason at this date why the third Wednesday in December should not be chosen for the above purpose, the day of casting the votes being the first Wednesday in December. With an adequate law, the President would thus be declared not later than December 22. The victorious party would then have cause of rejoicing during the succeeding week, and the defeated parties the delights of the Christmas holidays to assuage their disappointment ; the popular excitement and suspense would be ended more quickly, and the President-elect would have adequate time to anticipate his entry into office. If the election should fall upon the Houses, the approaching vacation would tempt them to an immediate determination of the question ; and, with the XII. Amendment clause repealed, they might be required to elect a President by December 24. There seem to be no reasons against, and there are these and other good reasons in favor of, such a change.*

If the last President had been declared December 22, 1876, agreeably to such a law, there would have been as much justice and satisfaction as there were at the date of its determination, the 2d of March following ; and there would have been an untold amount of excitement, suspense, money, and wickedness saved to the nation, which are well deserving of an estimate and consideration by the nation's statesmen.

Upon the subject of Opening and Counting the Votes, this 5th section has an important bearing, and it demonstrates that, in the

* Chapter xiv., "A New Law," sec. iv., and "The Secondary Election."

opinion of its authors, the President of the Senate performed these duties.

1. Congress is here particularized, and the evident intent is to enact such provisions concerning the Houses as will issue in the performance of their appointed duties. The duty specially mentioned in the Constitution is witnessing; therefore they are required to be present on the prescribed day. An Act of Congress could not extend to directing them how to witness, because the fundamental law has authorized each House to determine "the rules of its proceedings."

2. But canvassing the votes is not a "proceeding," which they are authorized to transact independently; it therefore requires a statute to regulate it, and Congress are authorized to make such a law by Art. I., Sec. VIII., 18. Since, then, this provision covers no other duty than that of being present, it is obvious that its authors did not hold that the Houses had the right to canvass.

3. The President of the Senate is a prominent character in the Constitution and in other parts of this Act, but he is conspicuously absent from this section. "Congress" is mentioned however, and that includes the President of the Senate. But it includes him as an independent agent, and places him in the same category as "Each House." As an officer of the nation, his duties are subject to regulation by law, but there is no provision made further than to procure the careful delivery of the lists to him. This proves that it was expected that he would execute his function "agreeably to the Constitution," as the section provides, and three parties are hereby recognized as taking part at the Opening and Counting.

4. The President of the Senate is the authorized agent to "open" the votes, but that duty is not here assigned him, because he obtained it from a higher authority. And it is a significant fact that "opening and counting" are linked directly together, as to be done by one and the same person. Since it is clear that Opening is the function of the President of the Senate, and since Counting is herein provided for in the same manner, it reasonably follows that it was designed that he should officially count.

5. Four things are by this clause provided to be done, two of which are not mentioned in the Constitution, viz., opening, counting, ascertainment, and declaration. As to the last two, the statute supplements the organic law, and very properly; the end of the constitutional pro-

ceedings is the declaration of the votes, but the end of the proceedings under the law of 1792 is the declaration of the President-elect.

6. But by this nomenclature, the meanings of the constitutional terms are fixed. The "opening" of the certificates must disclose the votes, which are then to be "counted" as an arithmetical operation, of which the practical and provided result is an "ascertainment" of the persons elected. If a power of canvassing is to accrue to the Houses at any point, it must be in "ascertaining," for the "declaration" is only a formal act and must accord with that ascertainment. But Congress cannot claim the power of "ascertaining" under the Constitution; if they may claim anything, it is only the power of "counting," which we have seen to be an arithmetical process. Therefore, all right of canvassing is here removed from their reach.

7. Compare this law of 1792 with the actual execution of it in 1793.* Rufus King of the Senate reports the proceedings agreed on between the three parties as follows:

"The two Houses shall assemble in the Senate chamber on Wednesday next at twelve o'clock:"—thus the attendance of Congress as Witnesses was arranged, and a mutual agreement effected as to the place of assembly.

"One person shall be appointed a teller on the part of the Senate, to make a list of the votes as they shall be declared." No mention is made of the House tellers, that being their private affair; and that teller is to make a clerical list of the votes as the President of the Senate declares them, for the purposes of the Senate alone. This was their plan, and the only rational plan of witnessing. "Declared" is a strong word, well known and often used at that date, and meaning an official proclamation; and there is no question about the fact that it was done by the Vice President, and corresponded with what we have termed "an official disclosure of the votes." *That was the Opening of the Certificates* provided for in Sec. V.

"The result shall be delivered to the President of the Senate, who shall announce the state of the vote and the persons elected, to the two Houses assembled as aforesaid." The President took the teller's list, whereon the various votes were brought together, and perhaps footed up, and announced or read it officially; *that was the Counting*

* Appendix, "Annals of Congress," 1793.

directed by the law of 1792, and it was done by the Vice President. He also announced "the persons elected"; *that was the Ascertainment* provided for, and was made by the Vice President officially, before "*the two Houses assembled as aforesaid,*" that is, in the Senate chamber to witness the proceedings.

"Which shall be deemed a 'declaration' of the persons elected, and, together with a list of the votes, shall be entered on the journals of the two Houses." *This was the Declaration* provided for in Sec. V., and it was officially made by the Vice President.

8. The word "ascertain," as employed in this law, is generally misinterpreted at present; it is colloquially used in the sense of "finding out," or "discovering," which is entirely foreign to its proper significance. *Ascertain* means "to make certain, to establish, to fix." By Johnson, Scott, Sheridan, Richardson, Booth, Wright, Boag and Worcester it is thus defined, and only since the days of Webster has it come to signify "to make certain by examination, so as to know what was before unknown." But Webster was not an authority in 1792. Therefore, when this Act provides for "ascertaining the persons elected," it does not mean that they are to be found out by canvassing State elections, or electoral votes; but it designs that they shall be officially established, ascertained, or fixed, and corresponds exactly with what was agreed upon in 1793, when the Vice President "announced the persons elected." A forcible illustration of this definition appears in the Constitution, Art. I., Sec. VI., 1, where it is ordered, "The Senators and Representatives shall receive a compensation for their services, to be ascertained by law."

9. This opening of the certificates, counting the votes, announcing the state of the vote, and announcing the persons elected, were to be executed "agreeably to the Constitution." That is, the President of the Senate was to perform the duties, and the Constitution was to be his standard. We have seen how faithfully this provision was followed in 1793.

10. It may in conclusion be observed, that this is not a constitutional provision, to be doubted and interpreted, but a law executory of the Constitution, interpreting and defining its provisions. The language of the Act, therefore, coupled with the execution of it a short time afterwards by its Framers, is an authoritative exposition of the meaning of the Constitution.

Sections VI. to XII. of the Act of 1792 are not very important just here, and have been noticed heretofore; they will therefore not be discussed.

The whole law exhibits the distinct purpose, which is especially proven by Sec. V., to direct a prompt settlement of the Presidential question, so far as physical convenience would at that time permit. Congress were required to be in attendance only on one day, and the various proceedings were directed to be executed "then." A rational interpretation of its intent as to these points is this:—The votes shall be all delivered to or procured by the President of the Senate on the earliest possible day, on which day Congress shall assemble, and the result of the election shall then be determined.

THE ACT OF 1845.

The Law of 1845* was the result of alleged gross election frauds at the two preceding State elections, and it was an assumption by Congress of the power of fixing the day "of choosing the Electors," which the Law of 1792 had evaded.

The Act reads as follows:

"The Electors of President and Vice President shall be appointed in each State on the Tuesday next after the first Monday in the month of November of each year in which they are to be appointed."

So far as the selection of the day is concerned, there is no objection to it. It, however, prescribes an "appointment," where the Constitution has limited it to regulating the "choice." Herein the Act is not only subversive of the intent of the organic law, but becomes practically inoperative. When the people of the States elect Electors, their appointment is not complete on that day, and it must subsequently be determined by canvass, and confirmed by commission or certificate.

In quite a number of instances the Constitution (and the "Federalist" expounding it) uses the two words, choose and appoint, and in several cases contiguously; in no instance, however, are they used in the same sense. According to that instrument, "choosing" is "selecting," and "appointing" is "ordaining." In other places it employs the word "election" technically, and thus distinguishes between

* Appendix, "Act of 1845."

that transaction and "choosing"; so that an election of Electors is a choice, but a choice is not confined to an election.* And the Resolution of 1787 recommends to the States that, after publication of the Constitution's ratification, "the Electors should be *appointed* and the Senators and Representatives *elected*."[†]

But the Act of 1845 interprets itself below, and exhibits the fact that "appointed" means "chosen." It proceeds:

"When any State shall have held an election for the purpose of choosing Electors, and shall fail to make a choice on the day aforesaid, then the Electors may be appointed on a subsequent day, in such manner as the State shall by law provide."

This provision is made necessary by the irregular wording of the first clause of the Act. Had it simply directed the States to "choose," the Legislatures would have been free to regulate appointments themselves in case of a failure to choose, or of the choice of an ineligible person, or of the fraudulent return of a person not chosen.[‡]

But, another difficulty presented itself. If an Elector duly chosen were to die, or resign, or refuse to serve, then the State might lose her representation. Therefore another clause was inserted, as follows:

"Each State may by law provide for the filling of any vacancy or vacancies which may occur in its College of Electors, when such College meets to give its electoral vote."

This clause provides that the State "may do," what she has a right to do, and has done from the earliest times; and it also would have been unnecessary, if the language of the Constitution had been adhered to.[§]

In fine, an examination of the Act of 1845 develops the fact that

* Chapter iii., page 54.

† Appendix, "Resolution of 1787."

‡ In the New York "Gazette and General Advertiser" of December 15, 1800, it is stated:—"In consequence of the probable absence of some of the Electors chosen by the people of this State, the watchful Democratic members of the Legislature, which was then in session, amended their electoral law, and on Tuesday, the 2d instant, appointed substitutes for the absentees."

A letter from Boston, in the same journal, referring to the action of the Legislature of Massachusetts in 1800, states that "a resolution yesterday passed both Houses, empowering the persons, appointed as electors of President and Vice President of the United States, to supply vacancies which may happen in their body by death or resignation, and directing them to assemble, on the day preceding the day for voting, for that purpose."

§ Chapter xiv., "A New Law," sec. 1.

it was not framed to be execratory of the Constitution, but to conserve the ends of party politics. Prior to this period political parties had begun to advance rapidly towards their existing attitude, which is the calamitous one of a division upon men and not on measures, with the end of grasping the spoils of office and not of furthering the interests of the nation. The original Bill of 1845 was conceived with this purpose in view, debated in an intensely partisan manner, and issued in the aborted shape which has just been glanced at.

AMENDMENT IN 1798.

The contest between Adams, Jefferson and Pinckney in 1796 was a very close one, and resulted in a close electoral vote in 1797. Shortly after the next Congress convened, questions sprang up concerning the Vermont election and certain frauds which had been alleged against her Electors,* and that spirit which had pervaded the Federal Convention for a time, whose object was the control of the Presidential elections by Congress, appeared in the shape of a proposition to amend the Constitution to that effect.

January 24, 1798, in the Senate, and February 16 in the House, resolutions were offered to propose the following amendment:

“1. The Electors of President and Vice President, in giving their votes, shall respectively distinguish the person whom they desire to be President from the one they desire to be Vice President, by annexing the word ‘President,’ or ‘Vice President,’ as the case may require, to the proper name of the person voted for.

“2. The Electors aforesaid shall inclose the very ballots by them given in the election, together with the lists of the votes by them made and transmitted to the President of the Senate.

“3. Should any contest arise relative to any vote for President, the same shall be determined by the Senate; or, should any contest arise relative to the vote for Vice President, the same shall be determined by the House of Representatives.

“4. Should no person voted for as Vice President have a majority of the whole number of Electors in his favor, then the Senate shall elect the Vice President from among those voted for as Vice President.”

It is apparent that the first and fourth of these resolutions were

* Chapter xiii., “1797.”

afterwards incorporated in the XII. Amendment. The second was designed as an additional guarantee of the votes of the Electors, and the third as a grant to the two Houses of the power to canvass the votes,—in a rational manner, however. Somewhat similar methods of canvassing were in vogue in the several States, as we have seen * But the Congress of 1798 had too great a reverence for the constitutional Electoral System, and refused to sanction the innovation.

It may be remarked here, that every amendment which has been proposed in Congress bears internal evidence of the fact, that it was designed to endow one or both Houses with a power over the election, which they knew was not vested in them by the Constitution.

AMENDMENTS IN 1823.

In 1821, the proceedings at the Opening of the Votes gave rise to a number of propositions to amend the electoral section.

The two Houses, prior to the appointed day, had agreed to an unlawful resolution, by whose terms the votes of Missouri would be neither counted nor rejected, but simply reported. Of course the concurrent resolution had no binding force on the Houses, and, when the occasion arose, an objection was made to the reception of Missouri's votes. The Houses separated, rejoined each other, and the resolution was executed by the President of the Senate in the midst of a disgraceful and uproarious scene.†

Upon a calmer consideration of the subject it was agreed that the President of the Senate had the right to decide upon the legality of the votes, and that Congress had not; therefore, as they desired to possess it in the future, a number of amendments were devised and laid before the Houses in 1823. Most of them provided for a "joint meeting," and that "questions as to the validity of the election of President shall be determined by the Senators and Representatives by joint ballot."

AMENDMENT IN 1834.

In January, 1834, another amendment was proposed, placed in the hands of a committee, and debated for some time. It provided for a Congressional power of "determining the legality or illegality of the

* Pages 216, 217, 218 and 220.

† Chapter xiii., "1821."

votes given for those officers (the Electors) in the States," but it was so clearly opposed to the spirit of the Electoral System that Congress refused to sanction it.

All these proposed amendments exhibit clearly the opinion which the Houses held in relation to a canvass of the votes, and demonstrate the fact that during these forty years they believed themselves not clothed with the authority.

AMENDMENT IN 1874.

May 28, 1874, Senator O. P. Morton submitted a report recommending an amendment which should provide for an election of President by direct vote of the people, to be prescribed and governed by Congress, who should have power to establish tribunals for the decision of contested elections. The report was never acted on.

Of this proposition it is only necessary to say that it could never receive the support of a true statesman, however much it might appeal to the prejudices of ignorance and demagoguery. It is against the manifest interests of the nation to-day, and proven by the facts of our political history, as it was against the manifest desire of the far-seeing Fathers, that millions of people should engage in a violent struggle to elect one man to an office.*

THE BILL OF 1800.

It is not necessary to overstep the limits of the "Annals of Congress" to determine the fact, that there has never been a Bill or Joint Rule proposed or passed by Congress, providing for the canvass of the votes by the Houses, which did not have its origin or end in partisanship and fraud.

The first of its kind was devised in 1800,† and its history is briefly this.

The Federalists, supporters of the administration, forecasting the political future, believed that they were about to be defeated in the Presidential election of that year by the Republicans, though expecting the vote to be a very close one. The political situation is clearly summed up in the following extracts from the published correspondence of the writers.

* Chapter xiv., "A New System."

† Appendix, "Bill of 1800."

By Oliver Wolcott, Secretary of the Treasury, December 15, 1799:

"In Pennsylvania the majority of the Senate is Federal; in the House the case is quite different. The Senate is desirous of providing by law for the choice of Electors by districts, by which mode the votes would be divided; the House is said to be inflexibly determined that the election shall be general throughout the State. It is reported, and I consider it as probably true, that the Governor has decided that he will reject a bill for a district election, and, if no law be passed, that he will authorize a general election by proclamation."

Thomas Jefferson to James Madison, March 4, 1800:

"The Federalists begin to be exceedingly alarmed about the election next fall. The event depends on the three Middle States—Penn., Jersey, and New York. Pennsylvania passes no law for an election at the present session. They confide that the next election gives a decided majority in the two Houses, when joined together. McKean therefore intends to call the Legislature to meet immediately after the new election, and appoint Electors themselves."

This difficulty in Pennsylvania, originated by the Federalists and progressing to a state of extreme bitterness, the administration party resolved to take advantage of. Knowing that they possessed at that time a majority of adherents in both Houses of Congress, and expecting the new House to be of a different political complexion, they deliberately and unscrupulously determined to enact a law which would enable them to win by foul, if compelled to lose by fair, means. The scheme was concocted and engineered by James Ross, who had been defeated for Governor of Pennsylvania by McKean, at the last election, and was therefore known as "the Ross Bill."

This political artifice has been tried over and over again, as will appear, and in no case has it proceeded from an honest desire to count the electoral votes according to law.

January 22, Mr. Ross moved in the Senate the appointment of a committee as follows:

"Resolved, That a committee be appointed to consider whether any, and what, provisions ought to be made by law for deciding disputed elections of President and Vice President, and for determining the legality or illegality of the votes given for those officers in the different States."

The advocacy of this resolution by its partisan proposers is not worthy of consideration as an expression of their honest convictions; the arguments are all founded on the bare letter of the Constitution in defiance of its spirit, and are the veriest clap-trap imaginable. They stand on the same plane as the arguments and votes of certain Congressmen during the recent election imbroglio, in direct opposition to their formerly expressed and recorded opinions. Their plea was that the Constitution had not directed a "canvass"; their argument was that the Houses had the right to "count," and their object was to obtain a law by which the Federal Senate could throw out sufficient Republican votes to carry the election. The proof of this lies in the fact that when they failed to secure the passage of the Bill in the terms which they desired, they refused altogether to enact it.

Three members of the Federal Convention sat in the Senate, and they unitedly denounced the measure from first to last, and voted against it in all its stages, but without avail. This fact is of prime importance. Their argument was that the Constitution absolutely prohibits Congress from exercising the power of "canvassing," that all questions as to election of Electors must be determined by the States, and that all questions concerning the votes were covered by the prescribed authentication of the Electors. They admitted the right of the Houses to "count" the votes as witnesses, but not as canvassers, and declared *of their own knowledge* that the Convention never designed investing them with such a power.

When it became apparent that the scheme would succeed, the Republicans philosophically set about amending it to the point of emasculation, and, led in the House by John Nicholas, who declared the Bill to be unconstitutional, and supported by a few honorable conservatives like James A. Bayard and John Marshall, afterwards Chief Justice of the United States, they succeeded. The result was that the Bill was finally lost. The Senate demanded a provision in it requiring a concurrent vote of the Houses to "admit" returns to which an objection had been made, whilst the House demanded a concurrent vote to "reject" them.

Divested of the mask of its "Grand Committee," its president Chief Justice, its verbiage and its devices, it was nothing more nor less than a game of political "thimblerig," with *admit* and *reject* for

the "little jokers." The one or the other of these words appears in every scheme of the kind ever devised, as circumstances required it.

The "Aurora" says of the Bill, in its issue of February 19, 1800 :

"It is a measure calculated to affect the approaching Presidential election, and to frustrate in a particular manner the interests of the people of the Commonwealth of Pennsylvania."

Charles Pinckney, in his masterly speech against it,* exposes its true *animus* thus :

"If the minority in a particular State find that the candidate they have unsuccessfully supported is the favorite one with the majority of Congress, or with this committee, they will easily discover the means of raising objections to the validity of the return of the Electors, insist that they themselves are elected, proceed to the length of meeting and voting, and transmit to Congress a double return."

Upon the immediate subject under discussion, the right of the two Houses to canvass the votes, he expresses himself most forcibly against it, asserts that their only duty is to "count over," or enumerate, the votes as witnesses, that it is the right of the President of the Senate to officially sum up the votes, and that all claim of "affirmative counting" by them is unauthorized. His language is as follows :

"It is made their duty to *count over* the votes in a convention of both Houses, and for the President of the Senate to *declare who has the majority of the votes* of the Electors so transmitted.

"It never was intended, nor would it have been safe, in the Constitution to have given to Congress, thus assembled in convention, the right to object to any vote, or even to question whether they were constitutionally or properly given. To give to Congress, even when assembled in convention, a right to reject or admit the votes of States, would have been so gross and dangerous an absurdity as the Framers of the Constitution could never have been guilty of."

Mr. Pinckney's reference to a "convention" arises from the fact that the sole foundation, upon which the defenders of the Bill sustained themselves, was that, as the Houses were formally assembled together in convention, it must have been in order that they might count,—*i.e.*, canvass,—the electoral votes. History shows, as we shall see, that at that day the Houses repudiated every suggestion of a "joint conven-

* Appendix, "Pinckney's Speech."

tion." His design is, adopting the allegation of a convention, to show them that even then he "knows," as one of the Framers of the Constitution, that their business is not officially to *count*, but clerically to *count over*. His change of the word used in the Constitution to the term "count over" is evidently made with that express intent.

Our remarks on the *animus* of the Bill may be fitly concluded by an extract from a letter of Jefferson to Madison, his *fidus Achates* on this occasion, dated May 12, 1800, wherein an excellent bit of satire appears in the simple underscoring of a word in reference to John Marshall's ruse and its effect; at the date of this letter the Bill had been lost:

"Congress will rise to-day or to-morrow. On the whole the Federals have not been able to carry a single strong measure in the lower House the whole session. When they met, it was believed they had a majority of twenty; but many of them were moderate men, who soon saw the character of the party. The Senate alone remained undismayed to the last. Firm to their purpose, regardless of public opinion, and more disposed to coerce than to court, not a man of their majority gave way in the least; and on the election Bill they *adhered* to John Marshall's amendment by their whole number."*

The fact that this Bill was offered in 1800 was one of the leading arguments in support of the Bill of 1877, establishing the "Electoral Commission."† It is therefore in point to examine a few of its details and observe how far its authority sustains the latter measure and its subsequent execution.

Each Bill was designed to enable a partisan Senate to "count in" a President whom the votes had rejected, and thus far they comfort and support each other.‡

Both Bills submitted disputed returns to a "Commission," composed in part of Justices of the Supreme Court, and in both their decision was final. John Marshall declared against the constitutionality of these features, which were stricken out in 1800, but retained in 1877.

Sec. 8 authorized the Committee to examine into "the qualifi-

* For details of Marshall's opinions and services on this occasion, *vide Chapter viii.*, page 188.

† Appendix, "Act of 1877."

‡ Chapter xiii., "1877."

cations of the Electors"; that is, if any of them were "Senators, Representatives, or officers of the United States," and if they were duly certified to by the Governor. But in 1877 the "Commission" declared it incompetent to make such examination.*

As to the "appointment" of Electors, the Bill of 1800 went no further than to provide for an investigation of the fact of its authorization by the State Legislatures. But the "Commission" of 1877 decided it according to "the determination of the State Returning Boards."†

The proviso attached to Section 8 positively prohibited examination of an objection "which has for its object to dispute or draw into question the number of votes given for an Elector." But the Bill of 1877 was devised and passed by Congress with the sole end in view of examining into fraudulent returns of the votes for Electors.

The proviso also expressly prohibited "consideration of the fact whether an Elector was chosen by a majority of the votes in his State or district." The "Electoral Commission" examined into the election in Oregon, decided who had the majority of the popular vote, and overthrew its determination by the State authorities.‡

The Bill of 1800 authorized the Grand Committee to determine "all disputes" concerning the election; but the Bill of 1877 limited the "Commission" to the judgment of dual returns, and the Houses decided all other disputes.

In the former Bill, as amended by the House, the Committee made only a report, and, if objection were made to it, the Houses voted on the returns as originally presented. But in the latter the "Commission" determined the returns, and, if objection were made, the Houses voted on the decision, a concurrence being requisite to overthrow it.

It would seem therefore that the production of the Bill of 1800 in support of that of 1877 was an act of dissimulation, intended to blind the eyes of the public by "glittering generalities," and that the "Commission," established in accordance with the authority of its provisions, ignored their authority in practice.

In sustaining the Electoral Bill of 1877 much stress was laid upon

* Chapter iv., page 85.

† Chapter iv., page 104.

‡ Chapter iv., page 108.

the terms of the amendment, proposed in the Senate to the Bill of 1800, which was defeated. It is therefore in point to examine it briefly.

In a letter, dated March 4, 1800, Jefferson writes to Madison as follows:

"To-day I forward Bingham's amendment to the Election Bill, formerly enclosed to you. Bingham's amendment" (to strike out the authority to examine into the *qualifications* of the Electors,—the Governor's certificate) "was lost by the usual majority of two to one. A very different one will be proposed, containing the true sense of the minority, *viz.*, that the two Houses, voting by heads, shall decide such questions as the Constitution authorizes to be raised."

March 25 the amendment was offered by P. N. Nicholas. It excludes all questions concerning the choice of Electors, which was the chief point in contest then, and it submits all other questions to decision by *a joint convention*, "*voting by heads*."

Now, what is the significance of this amendment? Manifestly to curtail the powers at which Congress were grasping, to deny the right of investigating the *choice* of the Electors, a power which the "Electoral Commission" recently declared to be, and which unquestionably is, unconstitutional. Why was it offered? Solely to circumvent the Federals, in a body overwhelmingly resolved to canvass the votes, and wherein the effort had again and again been made, but in vain, to defeat the Bill altogether. In amending it, therefore, it was necessary to reaffirm the basis of the original, whose first ten sections were to be erased by it, and that is what the above extract does, and that alone. In effect it says, we agree to your claim to canvass the votes, but object to the extreme powers you ask and your manner of executing them; and it has no higher authority than a compromise measure, introduced by one party as a foil to the political aims of the other, and was a "*manceuvre*," in like manner as was Marshall's amendment. By it, it was expected that the succeeding Republican House would outnumber and outvote the Federal Senate.

Let us look at the phraseology a little more narrowly. It says "the reasonable inference and practice has been that they (the votes) are to be counted (*i.e.*, canvassed) *by the members* composing said Houses." Now, there is not a person who has examined the Constitution or the Congressional practices under it, who does not know that

that statement is false ; the Houses never joined together, or pretended to canvass by their *members*, and it has always been held to be positively forbidden by the Constitution. Therefore the above is a gratuitous and unwarrantable assumption, inserted simply as an argument in favor of a "vote by heads," for which the next clause of the amendment provided.

The fact is that the Federals, for their interests, took advantage of the constitutional duty and the usual practice of the Houses to "count over" the votes, as Charles Pinckney puts it, as witnesses to the declarations of the President of the Senate, to claim the right of a canvass ; and the Republicans superadded the utterly untenable claim of canvassing by the *viva voce* vote of a joint convention.

It may be added that, at the canvass of the election of that year, both Houses passed a resolution declaring that the President of the Senate had counted the votes officially, which was also the case at the preceding canvass.* And in the report to the House by Mr. Nicholas, January 22, 1801, referring to a proposed amendment of the Constitution prescribing the election of Electors by districts, the customary mode of counting at that day is particularized as follows : " When the period arrives for opening the certificates and counting the votes in the presence of the Senate and House of Representatives," etc.

It would appear therefore that the production of this amendment in 1877 was an act of tergiversation ; for it was adduced as evidence of the right of the Houses to canvass *separately*, whilst its sole object was to affirm the right of the Houses to canvass *together*, "voting by heads."

THE BILL OF 1824.

In 1824 a second attempt was made to pass a Bill, whose object was precisely similar to that of 1800.

Its history in brief is this : There were four Presidential candidates in the field, but the contest chiefly lay between Andrew Jackson and John Quincy Adams. Forecasting the future, the Jacksonian Democrats perceived that the vote would be a very close one (which, however, by hook or by crook should be in favor of their candidate), and that the succeeding House would probably be Whig in politics,—that

* Appendix, "Annals of Congress," 1797 and 1801.

young party growing rapidly under the masterly leadership of Henry Clay. Martin Van Buren, an adherent of Jackson's and a shrewd politician, being chairman of the Senate Judiciary Committee, reported a Bill therefore, March 4, 1824, providing that, in case of an exception to the vote of any State when it was read, there must be a concurrent vote of the Houses to "reject" it. The Bill passed the Senate, but the House refused to entertain it.

Now, it must be remembered that the action of Congress, at the contest over the votes of Indiana and Missouri in 1817 and 1821,* had established the precedent that a concurrence of the Houses was required to "admit" a vote, were an exception duly made to its reception; which precedent was universally followed until 1877, when it was changed by the Electoral Act. Van Buren's Bill purposely militated against this custom, with what specific end in view is not now ascertainable, because the scheme eventually failed; but its terms, and the fact that it was devised at that juncture, are sufficient evidence that the Jacksonian Democrats proposed to "count in" a President by force of this shrewd law against the wishes of the opposition Representatives. The campaign was an exceedingly bitter one, charges of fraud were rife throughout the country, and doubtless some political trick was concealed beneath its fair exterior.

Curiously enough, when the time for counting the votes approached, Van Buren's position was reversed, and on the 8th of February, 1825, he opposed a similar resolution offered by the other party. It was anticipated that there would be a fierce contest over the votes of certain States, in whose certificates there were alleged informalities and illegalities. His candidate had not the requisite majority to be the President, and there was an unquestionable defeat for him if the election went into the House, whose majority was now in the opposition. It might be advisable therefore to object to certain returns, and to reject them by the *divided* vote of the two Houses, according to the precedents referred to.

On the other hand, it was clearly in the interest of the Federal party to prevent this, and to throw the election into the House, where their candidate would be chosen by the vote of the Federal States. Therefore they offered a resolution, requiring a concurrent vote to

* Chapter xiii., "1817" and "1821,"

"reject" returns excepted to, and to it Mr. Van Buren made the following unstatesmanlike reply:

"That the Senate had, at the last session, passed a Bill providing for every possible contingency for which the Constitution prescribed no rule, which Bill the House of Representatives had not acted on; that therefore, if any difficulty should arise on the present occasion, the Senate could not be reproached for it."

The Senate of 1824 acted precisely as had the Senate of 1800,—when they failed to carry their point, they refused to pass the Bill. And thus these political parties played at foot-ball with the Constitution!

The disparity of votes was too great, however, for the Democrats to execute their scheme, and ultimately the votes were counted as transmitted; Jackson was defeated, the election went to the House, and Adams was chosen President. At a subsequent session of Congress it was remarked, in regard to the alleged informalities in the returns, "Had the objections apparent on these certificates been then urged, supposing them to be well founded, and this House to be the constitutional judge of their sufficiency and of the validity of the votes, the issue of the election might have been very different."

THE 22D JOINT RULE.

In 1865, towards the close of the Rebellion, and when the loyal people of some of the Southern States were endeavoring to reorganize local governments, the famous, and infamous, "22d Joint Rule" was passed.*

Its history is briefly this. The proclamation of Abraham Lincoln, August 16, 1861, declaring the rebellious States to be "in a state of insurrection against the United States," had excepted "such parts of States as may be from time to time occupied and controlled by forces of the United States." In 1864, in those parts of Louisiana and Tennessee occupied by the United States, and under Mr. Lincoln's fostering care, State governments had been organized by the loyal citizens, and Electors accordingly appointed. This had been done in pursuance of a proclamation by the President of the 8th of December, 1863, inviting them "to resume their State rights and State functions."

But the policy of Congress, both Houses of which were then over-

* Appendix, "22d Joint Rule."

whelmingly Republican, was arrayed against this rational and statesmanlike method of "reconstruction," which they opposed persistently, and finally overthrew, after the assassination of Mr. Lincoln in 1865. They therefore introduced and passed a Bill,* which declared eleven States, including Louisiana and Tennessee, "not entitled to representation in the Electoral College," and the Bill was sent to the President for signature; but it was anticipated that he, being in favor of admitting the returns of those States, would refuse to sign it.† In order to execute their determination of rejecting them, it thus became necessary for the party to devise some other scheme, and they accordingly passed a concurrent resolution, known as "the 22d Joint Rule," which evaded the necessity of obtaining the President's signature. Their manner of passing it was described by Mr. Whyte in the Senate, March 13, 1876, as follows:

"It was wise at the beginning of this session of Congress that the Senate of the United States should undertake the work of reform, and annihilate a joint rule which was an enormity,—a rule which passed this body almost without debate, which was not intelligently discussed at all, or its defects properly pointed out. It passed through the rotunda to the other side of the Capitol, and there, at a night session, without debate, under a suspension of the rules, a Rule of such a grave character as that received the votes of a majority of the Representatives of the people. That Rule put it in the power of either House of Congress to defeat the will of the people, expressed at the preceding Presidential election."

The 22d Joint Rule was thus instituted in order to enable the party to accomplish without a law what they expected to fail of accomplishing by the constitutional means of a law.‡ And it may be observed of it further, that, notwithstanding all the previous years, sixty-five of them, of assertion, discussion and declamation, the year 1865 witnessed the first actual assumption by Congress of the power to accept or reject an electoral vote.§

The Rule provided that "No vote objected to shall be counted, except by the concurrent vote of the two Houses." Put in the affirmative way of the Bill of 1800, it required a concurrence of the Houses

* Appendix, "Act of 1865."

‡ Chapter ix., page 193.

† Chapter vi., page 141.

‡ Chapter xiii., "1865."

to "admit" a vote; and thus the "little joker" made its appearance again.

In 1869 and 1873 the 22d Joint Rule still obtained, and under it, in the latter year, the votes of Georgia, Arkansas, and Louisiana were rejected. The two Houses were still controlled by Republican majorities, and they thus maintained their power over the destinies of a Presidential election.

THE BILL OF 1875-6.

Concerning the matter of a Congressional canvass, some extraordinary "sharp practice" was displayed in the Senate in 1875 and 1876.

Its history is briefly this. The astute leaders of the Republican party, forecasting the future in 1875, saw that the political complexion of the country was changing, and that the majority of the people would probably cast their votes for the Democratic Electors in 1876. They still maintained their supremacy in Congress, but, believing that the succeeding House would be in the opposition, it became essential to devise a scheme and pass a law, by means of which they could manipulate the returns of the next election, and retain their party in power, against the will of the people, and of the House, if necessary.

Senator Bayard, in a speech delivered in the Senate, February 25, 1875, explained the *modus operandi*, as follows:

"The mind of the honorable Senator" (O. P. Morton) "who has had this matter in charge, has undergone some fluctuations on this subject. At first, he introduced a resolution for the absolute repeal of the 22d Joint Rule. After the lapse of a week he came into the Senate, and, calling up the subject, moved to amend his own proposition by simply changing that part of the Rule, which gave to either House the right to reject the electoral votes of a State, into a requirement that both Houses must join in the rejection, or the vote should be counted. Upon still further reflection, the Senator, by authority of his committee, has brought forward a new proposition in the form of a Bill, which is to accomplish its object by the act of the two Houses receiving the President's assent, and which can then only be repealed by their joint action."

The cause of these and the succeeding "fluctuations" is patent. The 22d Joint Rule, still in force, requiring a concurrence of the

Houses to "admit" the votes of a State, permitted either House to reject them. It answered very well so long as there was a popular adhesion to the Republican party, or a Republican ascendency in both Houses, but was manifestly dangerous if the Lower House became Democratic; for "two can play at the game" of rejecting votes, and it was well known that the Democracy were bitterly opposed to the governments established by Congress and maintained by the army in some of the Southern States, and it was anticipated that they would make use of the Republican precedent of 1869 (of rejecting a State's vote if cast under military surveillance), to reject the returns of these "carpet-bag" States by means of the Rule. Therefore, at first they moved that the Rule be repealed.

Upon second thoughts, however, they saw that the repeal would accomplish nothing; for at the outset the Rule had been only a reaffirmation of a right, which the Houses had since 1821 claimed to enjoy. Therefore they amended their original proposition within a week, by moving to substitute in the 22d Joint Rule a clause requiring a concurrence of the Houses to "reject" the votes of a State. By these means, were the next House Democratic, and never so much opposed to the "carpet-baggers," their votes must nevertheless be received. This was a resort to the scheme proposed by Van Buren in 1824.

And now in 1875 appears on the *tapis* a scheme, which has not been surpassed in political diabolism since the government was founded, and which was deliberately devised to procure a corruption of the Presidential election of 1876, in the interests of the Republican party. The proofs of this are recorded in the pages of the Congressional "Annals," and the results duly appeared at the Opening of the Votes in 1877.

The 22d Joint Rule, with its requirement of a concurrence of the Houses to "admit" the votes of a State, was an invitation to any rascally local faction to dispute the regular votes, and obtain the judgment of a possible party majority in Congress in their favor.* Charles Pinckney had pointed this out in 1800 as the legitimate issue of the Bill then pending, and, under the Rule, dual returns from Louisiana and Arkansas made their appearance in 1873. These were satisfactorily

* Chapter vi., page 146.

disposed of by the two Republican Houses, but the hint was not forgotten in 1875. Therefore their leaders determined, in disregard of the general condemnation of their "carpet-bag" governments, to maintain them at all hazards until the next Presidential election, and by their means, if the popular voice were against them, to procure certain fraudulent returns, which the law that they proposed to enact would decide in favor of the rejected candidate.

To accomplish this, the proposed amendment of the 22d Joint Rule was insufficient. It provided only for the rejection of votes by a concurrence of the Houses; therefore if one or more of these States sent in a fraudulent return, the Democratic House could not throw it out against the vote of a Republican Senate; but if the citizens of the State disputed the false and presumed to send in an honest return, what then? Undoubtedly the Democrats would insist on some new method of determining the case (a Congressional Commission, for example, such as the Republicans had employed in 1873*), and the honest vote of the State would ultimately triumph. Furthermore, the Joint Rule was binding only so long as the Houses agreed to retain it, and unquestionably the Democratic House of 1876 would rescind it. The strait thus demanded the passage of a suitable law, which could not be repealed by the act of the House alone, and to the construction of that law they at once addressed themselves.

The Bill was introduced in the Senate January 26, 1875.† It was artfully concocted and adroitly supported during a long discussion; the Democrats failed to perceive its purport, but they nevertheless suspected it, and therefore assailed it on general principles, whilst its authors insinuatingly advocated its passage, cooing the while "as gently as any sucking dove." That Bill contained the two following provisions:

1. "No electoral vote or votes from any State, to the counting of which objections have been made, shall be rejected except by the affirmative vote of *both Houses*.
2. "If more than one return shall have been received from a State, that return and that only shall be counted which the two Houses, *acting separately*, shall decide to be the true and valid return."

Thus nearly two years prior to the election of 1876, these men

* Chapter xiii., "1873."

† Appendix, "Bill of 1875-6."

remorselessly plotted for the transmission of fraudulent returns from South Carolina, Florida and Louisiana, and for foisting them upon the nation.

With this law, if their "carpet-bag" governments were successful at the polls, the electoral returns must stand; if they were defeated, as they probably would be, nevertheless the fictitious returns should stand. For, in case of dual returns, the objection must be made by the Democrats to the Republican vote, which would bear the Governor's signature and be *prima facie* valid; and, under the second clause, they would be compelled to receive it, otherwise it would necessarily be counted according to the specific terms of the first clause. The proof of this is exhibited not only by the measure itself, but by the repulse of an effort to amend the first clause by limiting it to the case of a State transmitting a single return; its authors would have nothing but what they proposed and desired,—thus following in the footsteps of their worthy predecessors in 1800 and 1824.*

In 1875 the Bill failed to become a law, and it was again revived, debated, and lost in 1876. In the mean time however, the 22d Joint Rule was in their way, as explained, and they abolished that at the beginning of the session. As soon as they had failed with their Bill and rescinded the Rule, they boldly assumed the position that the President of the Senate must count the votes and declare the result of the election. The President of the Senate was to be a Republican, and they determined that he should be a straight party man and "count in" the Republican candidate, elected or not.

THE ACT OF 1877.

As the day approached for the Opening of the Votes in 1877, the Republicans tenaciously clung to their claim of the power of the President of the Senate to canvass them.

Their ground was a sure one, for they were in league with the President of the United States, the commander-in-chief of the army, who had concentrated troops at the Capital and openly avowed his intention to inaugurate the man declared to be elected. That man would have been the Republican candidate. Meanwhile the Demo-

* The interesting and suggestive debate on this Bill appears in Appleton's "Presidential Counts," page 448.

eratic House were divided, distracted, and hopeless ; they knew that their candidate was the choice of the people, but they were powerless to seat him. The situation grew worse, and danger and disaster were imminent.

Then the majestic *Vox Populi* was heard demanding the passage of a Compromise Bill, and its command was heeded by the Houses. The Democrats were jubilant, for they expected at least a fair hearing ; the Republicans were downcast, for they foresaw the destruction of their scheme ; but the people were satisfied, for they hoped that justice would be done, and believed that peace and order would follow.

When complete, the Electoral Bill of 1877 was the Bill of 1800 revamped.* It provided as follows :

1. No electoral vote or votes, from any State from which but one return has been received, shall be rejected except by the affirmative vote of the two Houses.
2. If more than one return from a State shall have been received, all such returns shall be submitted to the judgment and decision of a commission constituted of five members from each House, and five Associate Justices of the Supreme Court, which shall proceed to consider the same with the same powers, if any, now possessed for that purpose by the two Houses, and by a majority of votes decide what votes are the votes provided for by the Constitution.
3. Whereupon such decision shall be read (before the joint convention), and the counting of the votes shall proceed in conformity therewith, unless, upon objection made thereto, the two Houses shall separately concur in ordering otherwise.

In framing this Bill, the Republicans had the benefit of their long experience in digging political pitfalls of a similar kind, and the unwary Democrats promptly fell into this one. It was the general expectation that the evidence of the legality of the returns would be considered by the "Commission," but that was provided against by permitting them to judge of their own powers. It was universally desired that the "Commission" should render a righteous judgment, but that was provided against by the constitution of a political and not a judicial tribunal. It was generally believed that the fifteenth Commissioner would be a non-partisan, but that was provided against by procuring his election

* Page 266, and Appendix, "Act of 1877."

to the Senate and the necessary selection of a Republican. It was fondly hoped by the Democrats that their candidate would be fairly counted in, but it was from the outset determined by the Republicans that he should be fraudulently counted out, and the issue was a victory for fraud, a defeat for justice and an utter disregard of the popular will.*

The outcome of such an Electoral Bill and of such an Electoral Commission could not have been better foreshadowed than by Commissioner Morton's own words, uttered in the Senate, January 26:—"As the Senator from California has said, somebody is to be cheated."

At this point, a brief review is advisable of the constitution of the "Commission," the powers and duties devolved on them and the legal effect of their decisions.†

As the Act sets forth, they were constituted for "the decision of all questions upon or in respect of such double returns named in this section"; meaning thereby the several, or dual, returns from Florida, Louisiana, South Carolina and Oregon; and, under the above authority, they decided certain questions pertaining to the ineligibility of United States officers.‡

The members of the "Commission" were five Senators and five Representatives; half Republicans and half Democrats, together with four Justices of the Supreme Court, half Republicans and half Democrats, who should select a fifth Justice,—half Republican and half Democrat, it is to be presumed, if he could be found. It was thus a political machine—nothing more, and the Act was radically defective in the employment of members of the Supreme Court for political purposes. It was widely predicted that the Judiciary would suffer a degradation thereby, and the anathemas since heaped upon its members sitting on the "Commission" have more than proven the imprudence of the selection. Though Congress were so unwise as to appoint them, a decent respect for the dignity of their own high function should have induced them to refuse the service. The Fathers were more sagacious and more reverent of the spotless ermine of the future Judges of the nation, for, when it was proposed in 1787 to make them advisers of the President and Congress on occasion, the Convention refused their sanction.§

* Chapter xiii., "1877." † Chapter iii., page 60. ‡ Vide Chapter iv.
‡ Appendix, "Journal of the Convention," August 6.

The "Commission" were "to consider the same" (*i.e.*, "the certificates, votes, and papers," or dual certificates) "with the same powers, if any, now possessed by the two Houses, and decide whether any and what votes are the votes provided for by the Constitution." It may have been designed that they should thus be merely an advisory committee, of trained and representative men, which Congress undoubtedly had the right to appoint; indeed it was stated, in support of the Bill, that they were only a committee, but this must have been done in palpable misconstruction of the effect of their action, as will be seen.

After each decision by the "Commission," the two Houses were to assemble together, and "such decision shall be read, and the counting of the votes shall proceed in conformity therewith, unless the two Houses shall separately concur in ordering otherwise." The Act thus artfully made it appear that the Houses were the final arbiters of the votes, in fulfilment of their claim of a right to canvass, which, if constitutional, they of course could not delegate.

But, observe the practical issue of this method of canvassing.

If Congress possess the power to canvass the returns, then they cannot delegate it to a committee, commission, or tellers; the two Houses must canvass in their separate and organized capacities of "Senate and House of Representatives," as the law requires them to assemble, and as, in fact, they did assemble and canvass under the Act. Assembled thus, it would have been their duty to take the three returns from Florida, for example, and decide upon which was the lawful return. But did they do this? No! They permitted the "Commission" to decide for them, and thus violated the provision of the Constitution under which they claimed to be acting.

For they were not then acting in their legislative capacity, wherein it may be both expedient and lawful to place a variety of resolutions and papers in the hands of a committee, to be examined and digested by them, and their decision laid before Congress for subsequent approval or rejection. As above stated, they were acting as canvassers, —a ministerial function,—in their organized capacity as Senate and House, by the vote of both Houses, and they could not lawfully modify or delegate the right or the power.

Further. When the Electoral Act was framed, it was in full view of the fact that the Senate was Republican and the House Democratic, and that each was resolved to support the returns of their own politi-

cal faction. A rupture between them was inevitable, if they themselves canvassed, a failure to decide, and a possible revolution; therefore the "Commission" was devised to prevent a catastrophe and to reach a decision, and it was in the nature of a compromise between the two Houses. But, under the Constitution, a duty cannot be compromised any more than a power can be delegated.

And finally. According to the Electoral Act, the Houses must concur in order to overthrow the decision of the "Commission"; if they did not concur, the decision must stand. That law was made with full knowledge of the fact that the Houses would never concur, and the issue subsequently was that they did never concur. Therefore, in whichever way the "Commission" decided, their decision must stand. The alleged canvassing power of the Houses was thus deliberately and absolutely transferred to the "Commission," the latter was constituted a tribunal with power of arbitrary and final decision, and the subsequent submission of their judgments to the Houses became a transparent sham.

Conceding to Congress the right to canvass the votes, the "Electoral Commission" was nevertheless an unconstitutional and illegal tribunal.

This being so, it follows that their decisions have no legal force; that is to say, whether they be according to law or not, they have no efficacy in determining who is the President of the United States. The President is elected only by the votes of the Electors,—Congress did not decide who were the Electors, while the "Commission" decided it illegally,—therefore, there being a contested election of Electors, the President-elect has not yet been lawfully declared, nor lawfully seated.

But one apology can be made for the Electoral Act of 1877, and that is,—a *de facto* President is better than a *de facto* revolution.

CHAPTER XIII.

ELECTORAL PRECEDENTS.

"Let there be no change by usurpation; for it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield."—GEORGE WASHINGTON.

1789.

IT has been very erroneously asserted by distinguished gentlemen, on one or two occasions, that the proceedings of Congress at the Opening of the Votes in 1789 were informal.

The facts are precisely the reverse, firstly, because the Houses began their duties under the special Resolution of 1787; secondly, because they were executing the Constitution for the first time; thirdly, because they were solemnly inaugurating the new government of a great nation; fourthly, because the eyes of the people were eagerly watching the momentous occasion; fifthly, because Congress were assembled in New York, among the wealth, the intelligence, and the skill of both native and foreign statesmen and diplomatists; sixthly, because eighteen of the forty signers of the Constitution sat in that Congress and now proposed to formally declare the meaning of their own handiwork; and seventhly, because they were about to establish a precedent as a guide to their successors for generations. These reasonable considerations all argue to the responsibility, dignity, and formality attending the Opening of the Votes in 1789, as do all of the proceedings recorded in the "Annals."*

The first procedure of the Senators was the election of John Lang-

* For a transcript of the journals of Congress, exhibiting the material proceedings at the Opening of the Votes from 1789 to 1877, *vide Appendix*, "Annals of Congress."

don, one of the Framers of the Constitution, as "President of the Senate, for the sole purpose of receiving and opening the certificates and counting the votes of the Electors." The meaning of this last phrase has already been fully discussed, and shown to devolve the duties of receiving, opening, and counting on the President of the Senate alone.* They elected a "President" of the Senate, not the "President *pro tempore*," whom they were authorized to elect, by Art. I., Sec. III., 5, of the Constitution, but an officer expressly provided for by the Resolution of the Federal Convention, for that sole occasion and for that sole purpose, and confirmed by the popular conventions of the States. That President of the Senate, John Langdon, was afterwards styled "the Vice President *pro tempore*."

The next act was the notification of the House of the readiness of the Senate "to discharge their constitutional duty, and to meet the House in the Senate chamber for that purpose." It is inscribed on the minutes as "that duty," which could not be both Opening and Counting, either grammatically or constitutionally; the word "that" is probably a clerical or typographical error, and intended to be "their," as substituted above.

This duty is described as witnessing in the next clause, when they state that "the Senate have appointed one of their members to make a list of the votes as they shall be declared." They further submit it "to the wisdom of the House to appoint one or more of their members for a like purpose." The duty of this teller as a clerk, the necessity of the designation of a committee of one or more of their own members to actually inspect the certificates, count the votes, verify the result, and deliver it to the clerk of the Senate for entry on their journal, and the obvious design of hereby simply "witnessing" the proceedings, have already been sufficiently dwelt upon.† The House appointed two tellers, as their own records show, to witness for them.

The next act was a notification of the Senate by the House, that they were "ready forthwith to meet them, to attend the Opening and Counting of the Votes." Here their duty is clearly set forth. The House and the Senate were first to meet, and then to attend the Opening and Counting, in their character of witnesses. This latter phrase, being so specific, aids in explaining that used in the Senate records.

* Chapter xi., p. 239.

† Pages 163, 167, 174, 180 and 256.

The next record is so clear and exact, that upon it alone might rest the whole question of the Electoral Count. It is as follows, in full, and is evidently an *ex post facto* narrative of the proceedings:

"The Speaker and the members of the House of Representatives attended in the Senate chamber; and the President, elected for the purpose of counting the votes, declared that the Senate and House of Representatives had met, and that he, in their presence, had opened and counted the votes of the Electors for President and Vice President of the United States."

This was a solemn, formal annunciation, made by an intelligent and prominent Framer of the Constitution, both of his constitutional duties and of their present official fulfilment, and it expressly, absolutely, and finally determines the constitutional principles involved in it.

1. Note the clerk's entry. It records two things only,—the witnessing of the Houses, and the official acts of the President of the Senate,—the only two duties which the Constitution prescribes. The first paragraph erroneously speaks of the attendance of the House as "the members of the House," which is corrected in his repetition of the Vice President's language; this error shows both the clerk's want of knowledge of the technical language of the law, and John Langdon's acquaintance with and formal employment of it; and it further enforces our surmise that the clerk's reference to "that duty" was a mistaken one.

2. When the President of the Senate summed up the various acts done by him, he declared, first, that the two Houses "had met." We have heretofore observed that it is his duty to see that the Houses take their part in the proceedings, as fully as it is theirs to see that he performs his part faithfully. Langdon recognized this, and felt himself called upon to announce that he had executed it.

3. There is here no possibility of splitting hairs over the duties of the office to which the President had been elected. Most probably he opened his declaration in this wise:—"As the President of the Senate, appointed for the sole purpose of opening and counting the votes of the Electors, I now declare," etc.; for the clerk is here evidently following his language. He thus asserts himself to have been "elected for the purpose of counting the votes," and claims the right of officially counting them before eighteen of the foremost members of the Federal Convention.

4. He goes further, and declares formally and officially that he had "opened the votes,"—not the certificates,—meaning that he had canvassed the votes. He purposely follows the phrasology of the Constitution, and expounds it by the way in which he connects the acts together. He declares "that he, in their presence, had opened and counted the votes." He clearly and emphatically proclaims that he alone is the official agent of the nation, and that the two Houses are simply witnesses; and this in solemn declaration before eighteen of the Framers of the Constitution.

5. It is in order to demonstrate just here, that there was an official canvass of these votes. A reference to Art. I., Sec. II., 3, of the Constitution* will show, that the eleven States which had ratified the Constitution were entitled to 81 Electors; and a reference to the "Annals of Congress" will show, that but 69 votes were counted for George Washington; there were therefore 12 votes wanting and to be accounted for. None of the inquiries, remarks, statements, or acts of either the President, Tellers, or Houses during the progress of the Opening and Counting are here given, but we know that certain things must have occurred. All parties on that occasion were ignorant of the precise state of the vote and the contents of the certificates, though the result was generally surmised. We must conceive, them, therefore, with their Constitutions open at the record of the authorized number of Electors, and awaiting the announcement of the votes.

When the President of the Senate had opened the votes of New Hampshire, Massachusetts, and Connecticut, the next certificate was that of New York; but it was wanting, and with it eight electoral votes. We know that such a hiatus would require official notice to-day. There are cases all through the "Annals" where such defects or errors were announced by the Vice President, and we may reasonably conclude that the President of the Senate officially declared that he had not received any certificate or vote from the State of New York.

Maryland and Delaware were entitled to 8 and 12 votes respectively, but only 6 and 10 were received; why is unknown, but the fact at that time must have been officially explained by the President. Both States must have appointed their quota of Electors, and either four of

* Appendix, "Constitution of the United States."

them failed to vote, or four votes were rejected as invalid for cause. This was a ministerial canvass of the votes, and must have been done as part of the process of Opening; there was no rule then existing, such as was made in 1793, providing for "reading, declaring, ascertaining, or announcing" the votes, and no opportunity to refine on the legal intent of the naked language of the Constitution, which prescribed the number of votes belonging to the States and their official and declarative disclosure. The President of the Senate alone transacted all these proceedings, and announced that he had officially done so in the presence of the two Houses.*

The next and concluding step of the proceedings was a declaration of the result by the President of the Senate, which consisted in the reading over the list of the votes, probably furnished him by the tellers, "whereby it appeared that George Washington, Esq., was elected President, and John Adams, Esq., Vice President of the United States of America."

These officers being duly elected and declared, it was necessary to officially notify them of their election. Therefore, at the request of the House, delivered by James Madison, and by direction of the Senate, John Langdon prepared a certificate, in which he recites, over his signature, that "the underwritten, appointed President of the Senate for the sole purpose of receiving, opening and counting the votes of the Electors, did, in the presence of said Senate and House, open all the certificates and count all the votes."

It is utterly impossible to traverse the force of this declaration. It is an authoritative exposition of the Constitution, made by its Framers, and it irrevocably fixes the function of the President of the Senate to be "counting the votes." In connection with the foregoing declaration, it substantiates our view that his official function is also, by *express* grant of the Constitution, "canvassing" the votes. And the scrupulously exact proceedings, together with their minute conformity with the Constitution, demonstrate the purpose of the Fathers to

* As evidence that these proceedings were at that time regarded as an official "canvass" of the votes, the report of the "New York Packet," April 7, 1789, may be quoted, as follows: "Yesterday the Honorable the Congress of the United States met in Federal Hall, when, the ballots for President and Vice President being canvassed, it appeared that his Excellency George Washington is chosen President, and his Excellency John Adams Vice President."

have been to execute their own Electoral System solemnly and formally, as an official and incontestable Precedent for succeeding generations.

The precedent was carefully followed for thirty-five years, forgotten or practically disregarded for forty years more, and wholly abandoned during the last fifteen years.*

1793.

In 1792 the Electoral Act had been framed, and henceforth the two Houses were to execute a law, and not the Constitution, at the Opening of the Votes. They had also provided the means for transacting conveniently their separate and mutual business, and among other things that of the "joint committee."

The House, eight days before "the second Wednesday in February" appointed a committee to confer with "such committee as may be appointed by the Senate, to ascertain (*i.e.* to make certain, or establish†) and report a mode of examining the votes," and for several other purposes connected therewith. This "examination" was a simple inspection, as will appear; the committee were "to make certain" a mode of examination, with the intent no doubt of fixing or establishing a precedent in the regular parliamentary manner. They were not to report "a mode of *counting* the votes," but only a convenient way of inspecting and verifying the President's declarations.

The committee reported a mode, which has the singular feature of

* That our view of these proceedings was not only that of the statesmen of the time, but of the public, is shown by the following extract from the New York "Daily Advertiser" of April 7, 1789:

"Yesterday the Honorable the Congress of the United States, having a quorum of both Houses, proceeded to business.

"The Senate having chosen his Excellency John Langdon, of New Hampshire, President, for the sole purpose of opening and counting the votes for President and Vice President of the United States, the House of Representatives attended in the Senate Chamber, when his Excellency opened and examined the ballots of the Electors of the several States.

"The illustrious George Washington, Esquire, was then announced President of the United States of America, and his Excellency John Adams, Esquire, Vice President."

To which may be added the historical statement of Chief Justice Marshall, before adverted to: "The votes for the first and second magistrates of the Union were opened and counted in the presence of both Houses."

† Chapter xii., page 257.

an assignment of three distinct parties to the Opening and Counting, each of whom was to perform a specific duty. The two Houses were to "assemble" together, the Tellers were to "make a list of the votes," and the President of the Senate was to "declare the votes and announce the state of the vote and the persons elected." These duties have heretofore been fully considered.* It is noticeable that this report exactly follows the precedent of 1789, even to the appointment of three members to make lists of the votes. Further, the record shows that the resolution in the Senate specifies one teller only, whilst that of the House specifies "two tellers on the part of this House"; here again is an emphatic declaration that the tellers were not to engage in any joint transaction. It is clear, therefore, that the mode provided was that of an independent witnessing by each House, at which their respective tellers were to represent them, two lists being made and subsequently reported back to the Houses in regular session, as the minutes show.

The House journal records that the tellers afterwards, in accordance with the directions of the concurrent resolution, "delivered in at the Clerk's table a list of the votes of the Electors of the several States, as the same were declared by the President of the Senate in the presence of the Senate and of this House"; thus again affirming that he, and not they, had declared what were the votes. The Senate journal shows that "the Vice President opened and read (declared) the votes," the tellers meanwhile making their lists; which was, as has been seen, a canvass of them. He then delivered the certificates "to the tellers appointed for the purpose, who, having examined and *ascertained* (inspected and made sure of) the votes," as being in conformity with his declaration, presented a list to the President, which was "read to the two Houses." That "list" appears as a simple record of names and members, summed up, mentioning only the votes declared, and was "the state of the vote" which was thus "announced."

There could be nothing clearer than that these tellers were all the while simple clerks, the Houses witnesses, and the President of the Senate the official canvasser of the votes. There is no significance in his handing the certificates to the tellers after declaring the votes; he thus permitted them formally to verify his canvass. There is no

* Pages 163, 167, 174, 180 and 256.

significance in their giving him one of their lists to read the result from, except as a convenience agreed to by the three parties. And there is no doubt whatever that the transactions here are an exact copy of the precedent laid down in 1789, when the President declared that he had opened and counted the votes in the presence of the two Houses.

The votes were to be "declared" by the President, and he also "declared" the election. The word declare is used as a solemn, official proclamation alike in both cases, and must have had a forcible meaning in the minds of men who had witnessed the Declaration of American Independence. It is impossible to belittle that word as used in 1793, by attempting to attach any other significance to it.

The Senate journal records that, when twelve o'clock arrived, the Senate sent their Secretary to notify the House "that the Senate are ready to meet them in the Senate chamber *to attend* the opening and counting of the votes"; which is a specific acknowledgment of their presence there simply as witnesses; and, whatever the subsequent proceedings may be tortured into implying, it is here admitted that "the opening and counting of the votes" was executed by the President of the Senate.

Furthermore, as shown by the Apportionment Act of 1792,* there were missing votes on this occasion, as there were in 1789, Vermont being short one and Maryland two. These must have been referred to and explained officially; but no record is kept of them, because the tellers were to report only "the votes declared." Perhaps there was a "vice" in this Vermont return, so that one of the votes was not "valid," as there was claimed to be in that at the succeeding election.

John Adams, as President of the Senate, finally declared George Washington and John Adams duly elected, and the former only was formally notified.

1797.

In 1797 another joint committee reported by the same resolution the same mode, whereby the Houses were to witness separately and report the proceedings.

* Appendix, "Apportionment Act."

The Senate received at the appointed hour a message from the House, informing them that the House "were ready to meet the Senate in the chamber of that House, to attend the opening and examining of the votes." It appears sometimes that verbal messages and resolutions were blunderingly recorded by the clerks of the Houses, as in the instance above.

When assembled, the President of the Senate thus addressed the Houses :

"‘ Gentlemen of the Senate and of the House of Representatives : The purpose for which we (not *you*) are assembled is expressed in the following resolutions. (Here he read them.) I have received packets containing the certificates of the votes of the Electors from all the States in the Union. I have also received duplicates of the returns by post from fifteen of the States ; no duplicate from the State of Kentucky is yet come to hand. It has been the practice heretofore to begin with the returns at one end of the United States, and to proceed to the other ; I shall, therefore, do the same at this time.’"

"Mr. Adams then took the packet from the State of Tennessee, and, after having read the superscription, he broke the seal and read the certificate of the election of the Electors. He then gave it to the Clerk of the Senate, requesting him to read the report of the Electors, which he accordingly did. All the papers were then handed to the tellers, and, when they had noted the contents, the President of the Senate proceeded with the other States."

Now, no one can read the foregoing extract without perceiving that John Adams was not acting as the agent of the Houses, but as an official national agent, and that he recognized the presence of three independent parties. The care with which he follows the precedents, shows that his explanation of the missing certificate was copied after his predecessors' explanation of missing certificates and votes. The order of opening the certificates he selected to please himself. He "opened" the electoral certificates by breaking the seals *and reading them officially*, thus "declaring" the votes in the presence of the Houses. By reading the certificate of the Governor of the State, he publicly accepted the Electors thereby appointed. His request to the Clerk of the Senate to read the report was a precedent afterwards followed, but it obviously was done for his own convenience.

And the tellers, examining the certificates, simply "noted their contents."

The circumstances surrounding this Opening were very peculiar, and are well worth a brief examination.

The Legislature of Vermont had failed to enact a law prescribing the "manner" of the appointment of Electors, and it was argued that therefore their votes were invalid. In regard to this matter, James Madison, a political coadjutor of Thomas Jefferson, wrote him as follows December 25, 1796, being then not in possession of all the returns:

"I cannot entirely remove the uncertainty in which my last left the election. Unless the Vermont election, of which little has of late been said, should contain some fatal vice in it, Mr. Adams may be considered as the President-elect."

January 8, 1797, he wrote to Jefferson again:

"If the Vermont votes be valid, as is now generally supposed, Mr. Adams will have 71 and you 68, Pinckney being in the rear of both."

The election of 1796 was as close as that of 1876; if the Vermont votes were invalid, Thomas Jefferson was the President by a majority of one. How did the Fathers decide the question which was here raised, and strongly urged by petition from the political adherents of the Republican party? In this way. Seventy-one votes were counted for "John Adams" by himself as President of the Senate, without a single objection or comment. Congress therefore decided the question of State appointment against their own right of inquiry into it.* And they did more,—the question being then actually discussed, they decided in favor of the power of the President of the Senate to canvass and count the votes.

The certificate of the Governor of Vermont was alleged to have a "vice" in it. Mr. Adams personally and officially accepted it, as the lawful evidence of the appointment of her Electors. Though the votes were declared to be "invalid," he officially accepted them. When we recall the fact that John Adams executed his duty in the face of a strong opposition, occupying too the delicate and even painful (as the record suggests) position of the canvasser of his own election, and

* A discussion of the principle determining this decision appears in Chapter iii., page 61.

that he declared himself duly elected, we may be assured that he assumed not one jot or tittle of authority more than every one present knew was devolved on him by the law and the Constitution.

With regard to Madison's opinion of this case, it is apparent from his first letter that he had heard a rumor of an invalid election of Electors in Vermont, of the facts of which he possessed no knowledge and was therefore unable to give an opinion. In the second letter it appears that he had heard the facts in the case, and had concluded that the returns were valid. In his secret heart there could have been no doubt of it, for he had expressed his opinion on the point involved in 1792, as heretofore noted,* and he was one of the Framers of the Constitution, who had sat in the Senate chamber in 1789 and acquiesced in the declaration of John Langdon, that he had "opened and counted" the votes. As his subsequent actions prove, he tacitly reaffirmed his approval of both a Canvass and Count by the President of the Senate.

At the very next session of Congress an amendment to the Constitution was proposed, as heretofore quoted,† giving to the two Houses the right to canvass the votes.

It is a significant circumstance also that on this occasion was revived, after much debate, the custom established by John Langdon in 1789 and afterwards followed for twenty-eight years, of advising one or both of the parties chosen of their election by the formality of what is termed a "notification certificate." As the records show, this certificate was the act of both Houses of Congress, in the shape of a concurrent resolution, authenticated by the hand and seal of the President of the Senate; and it specifically declared that he, and he alone, had "opened and counted the votes." Remembering that the question of the "vice" in the Vermont election had been hotly discussed, that Congress had been petitioned to take cognizance of it, and that they had debated their rights and privileges in the premises, the value of their matured judgment, that under the Constitution the President of the Senate alone officiated here, is apparent.‡ This evidence of the opinion of the statesmen of that day is unimpeachable.

* Chapter xii., page 249.

† Chapter xii., page 260.

‡ The unusual proceedings of Congress concerning the notification are set forth in detail in Appleton's "Presidential Counts."

John Adams being "on the ground," as Jefferson writes, January 16, 1797, to Henry Tazewell, a Senator, required no notification, and it was sent on this occasion only to the latter.

1801.

The same mode of procedure was adopted, except as follows. Thomas Jefferson was about to open and canvass the certificates, which gave him and Burr a tie vote; therefore the resolution, after reciting the formula that the President of the Senate should declare the result, adds "and if it shall appear that a choice has been made agreeably to the Constitution, such entry on the journals shall be deemed a sufficient declaration thereof." This was to protect themselves as witnesses, in case of a fraudulent declaration, and sustains our view that the concurrent resolution was designed to provide for the business of the two Houses alone.

It is stated in the House journal that "as the votes were read the tellers of each House counted and took a list of the same, which, being compared, were delivered to the President of the Senate." We all know that the custom of the tellers at a meeting is for one to count out aloud the votes as they are given and for the others to record them; this is undoubtedly what they did here on this extraordinary and unique occasion; or, to use Mr. Pinckney's words, they *counted over* the votes, as declared. By the result as declared by Jefferson, he and Burr received a tie vote, and the subsequent election in the House resulted in the choice of the former for President. The two Houses then prepared a notification to be sent to Mr. Burr, wherein it is specifically stated that "the underwritten, Vice President of the United States and President of the Senate, did in the presence of said Senate and House of Representatives, open all the certificates and count all the votes." This was the official Count, as that by the tellers had been the clerical count, the language being too definite to admit of doubt.

To show the fact of an official canvass here again by the President of the Senate, the case of the Georgia votes may be cited; it proves that there was no intervention by the two Houses, and it is not recorded by them, as the other cases referred to were not, because it was not a part of their business. The Georgia votes, now on file at Washington, were equally divided between Jefferson and Burr; but they had no certificate attached and no statement of the persons for whom

they were cast. It has been erroneously alleged that Jefferson used his power as official canvasser to employ them against Aaron Burr, which is an utter absurdity, in view of the record of the Houses. Jefferson accepted the vote, notwithstanding its informality, and divided it between the two candidates, because he knew that it had been cast for "two persons," and that they were the two; and he thus provided the clearest evidence of his official right to accept or reject a State's votes, without any intervention of the Houses.

A statement made by Senator Hamlin, January 24, 1876, may throw some additional light on this return, which he held in his hand as he spoke:

In the case of the Georgia vote in 1801, "there was no certificate accompanying the return that the Electors met and balloted. It had nothing on its face to show that the votes were given for anybody. Clearly it did not conform to the Constitution, but it was counted as shown by the record.

"There was a tradition that the tellers handed it back to Mr. Jefferson, who returned it to them, and decided that it must be counted."

The probabilities are that Jefferson knew the votes to have been regularly cast, and uncertified by a simple blunder. He was occupying a trying position, and it was very important that he should do nothing to invoke censure from the eager and excited opposition. Had he rejected them, it would have instantly been regarded as a suspicious act, and that would have provoked indignation and inquiry and confusion very probably; he therefore thought it expedient to prevent a difficulty by accepting and dividing them, and thus he allayed all disquietude. His decision, however, is none the more defensible on that account, though it may have actually averted an outbreak.

1805.

The concurrent resolution was not adopted in 1805, only the Senate acting in the case, with the evident intent of asserting an authority superior to that of the House. During all this period the two Houses never failed to assert their right of independent action.

The House appointed their quota of the customary joint committee by a resolution, which the Senate coolly refused to concur in; on the other hand they notified the House that they, the Senate, would meet

them in the Senate chamber the next day "for the purpose of being present at the Opening and Counting of the Votes," and that they had "appointed a teller on the part of the Senate, etc.," as the usual formula ran. The House passed a separate resolution, fixing their own movements and appointing two tellers for a similar purpose. It is obvious from this mode of procedure that there existed some ill feeling between the Houses upon some question connected with the Opening and Counting. The action of the Senate was taken on the day preceding the appointed time, and was doubtless designed to assert the non-joint functions of the Houses, which had been discussed apparently and decided differently in the Lower House. The fact of this disagreement and its probable cause are interesting in view of what actually occurred.

According to the record of the Senate :

"The President (Mr. Burr) stated that there had been transmitted to him several packets which appeared to be the votes of the Electors. He said, ' You will now proceed, Gentlemen, to count the votes as the Constitution and laws direct.'

"The President then proceeded to break the seals of the respective returns, handing each return and its accompanying duplicate, as the seals were broken, to the tellers through the secretary ; Mr. S. Smith reading aloud the returns, and Mr. J. Clay, and Mr. R. Griswold comparing them with the duplicate return lying before them. According to which *enumeration* the following appeared to be the result, etc. After the returns had all been examined, without any objection having been made to receiving any of the votes," etc.

These proceedings are clearly a variation of those pursued by Langdon, Adams, and Jefferson, but, upon closer examination, only in form and not in spirit. The House record the proceedings in the usual way, and note that the tellers "made a list of the votes as they were declared." Burr's address is evidently made to the tellers, and his refusal to either read the superscription or any of the contents of the certificates indicates simply an exhibition of pride and haughtiness on his part. The counting which the tellers performed is declared to be an "enumeration," or clerical act. The record, that no objection was made to the reception of any of the votes, indicates that such a question had been raised ; and the discussion concerning the exclusion of the public from the galleries (which was first ordered in 1801) con-

firms our view of antecedent dispute and anticipated trouble. No difficulty occurred, however, and everything proceeded regularly, three of the returns being noted as peculiar, but certainly not illegal.

Some light may be thrown on the subject by reverting to the fact that the Federalists in 1800 had claimed the right of the Houses to canvass the votes and projected a fraudulent scheme of counting in a President, which had failed; that Jefferson at the next Count had assumed official authority over the returns; that the proposed amendment, authorizing a Congressional canvass, had been rejected, and the XII. Amendment adopted without conceding them any additional power, and that there was an existing difficulty and impending disagreement. However Aaron Burr's sentiments or language may be construed, the precedent made by him in 1805 is not valuable as a just exposition of the Constitution, in view of the fact that the very next year he was tried by the Government for treason. But it was an unfortunate example, set by an unscrupulous man, which some of his successors have been only too eager to follow.

The two Houses emphatically affirmed their part in the transaction to have been a simple act of witnessing, by preparing a certificate of the election which declares that the Vice President "counted the votes in the presence of the Senate and House," and to which Mr. Burr was required to affix his hand and seal.

1809.

In 1809 the precedent of 1805 was totally repudiated, and the Houses adopted the mode established by Congress in 1793. The President of the Senate *pro tempore* retained one set of the certificates and gave the other to the tellers, who read them, and compared and noted the votes; in permitting the tellers to read the certificates, he followed Mr. Burr's act, as a precedent.

Petitions had been sent in objecting to the returns from Massachusetts as "irregular and unconstitutional, and praying for the interference of the Senate and House of Representatives." They were laid on the table, on the ground of a lack of power to interfere. An objection was made, while the Houses were witnessing, that the Governor's certificate was not attached to the returns of another State, but no attention was paid to it. One of the votes from Kentucky was missing, but it was not regarded; subsequently this was brought

up in the House, and it was decided that "they had no concern with the causes why any vote was not received." Again the Houses adopted a resolution notifying James Madison and George Clinton of their election, and certifying under seal that the "President of the Senate *pro tempore* did, in the presence of the Senate and House of Representatives, open all the certificates and count all the votes." There was obviously a decision of disputed questions by that officer according to the record, and therefore a canvass of the votes.

A very interesting episode occurred on this occasion, which is worthy of notice.

Prior to the meeting of the Houses the occupation of the Speaker's chair by the President of the Senate, during the Opening, was objected to by John Randolph, it being asserted that he claimed it "as a matter of right." A warm discussion ensued, in which Mr. Randolph declared :

"In everything touching the privileges of this House, as it regarded the claims of the other co-ordinate branches of the Government, he would stickle for the ninth part of a hair."

The discussion thus concerned the rights of the House of Representatives at the Opening of the electoral Votes. During the course of the debate Mr. Davenport made the following significant remark, in expressing his opinion on the immediate point:

"He had no doubt of the propriety of the President of the Senate presiding at a joint meeting,—more especially as he was the person designated by the Constitution *to count the votes.*"

To which Mr. Randolph, who was stickling for the ninth part of a hair of the House's rights, replied :

"Let their President count the votes, sir; there is a very good chair for him, in which the clerk sits."

These assertions and agreements as to the right of the President of the Senate to officially open and count the electoral votes, made under the peculiar circumstances and uncontradicted, are evidence of the general concurrence of Congress as to this point. If Randolph or any one present had doubted this power, the allegation would unquestionably have been seized upon as an additional and the best reason why the President should not assume the Speaker's chair in a House upon whom was devolved the right of independently canvassing and counting the votes.

1813.

The precedents of 1793 were followed in 1813, each House passing a resolution fixing the mode of witnessing separately.

A formal certificate, under seal, was again prepared by the House, stating that the President of the Senate had opened and counted the votes.

1817.

In 1817 the precedents of 1793 were followed to the letter by the two Houses, and at their conclusion the formal certificate, to the effect that the President of the Senate had opened and counted the votes, was adopted.

Hitherto the message sent by one House to the other had always been a notice of readiness "to attend at the Opening and Counting"; now it is changed to a notice of readiness to "proceed in opening the certificates and counting the votes." These records appear to be made on the responsibility of the clerks, and are sometimes palpable blunders, as in this instance; but they became precedents to succeeding Houses nevertheless, and have often been adduced as proof of the powers claimed by the early Congresses. Their evidence however is worthless when examined, for the records are too obviously full of the mistakes of ignorance and carelessness.

The custom of having the tellers read over the certificates was by this time fully established, and the practice was for the President to unfold the certified lists and pass them at once to the tellers. Having just observed the origin of the custom, we know that the act was a clerical one; but it is easy to be seen how, little by little, it might come to be considered an official duty attached to the tellers on behalf of the Houses. The Fathers of the Constitution were no longer represented in the halls of Congress, and the journals embalmed only these lifeless records, whose spirit fled on the day that they were created.

In 1817 a wide departure from former customs was made, by the separation of the Houses to consider an objection raised during the progress of the Opening. The records show that the question was sprung unexpectedly, that the Houses acted impetuously, and that the procedure was afterwards regretted and condemned. Nevertheless it became a precedent which was eagerly seized upon subsequently as

authoritative, notwithstanding the emphatic disclaimer made by its authors. The source of the unfortunate difficulty was the want of a law defining a "State," and its issue should have been, but was not, the immediate enactment of a suitable statute.

The State of Indiana was formally admitted into the Union on December 11, 1816,—after the day prescribed for the meeting and voting of the Electors. Hence the query, Was she a State when her Electors were appointed and voted? If not, both the appointment and the votes were invalid.

When her returns were reached their reception was objected to by a member of the House, who addressed the Speaker; the latter promptly interrupted with the remark that, "while acting in joint meeting, they could consider no proposition, nor perform any business not prescribed by the Constitution." This was an emphatic declaration that the only duty of the Houses was to witness the President of the Senate open and count the votes. The question raised was, Can the Houses prevent the counting of the votes? and it was decided in the negative.

The Senate, however, on their own motion, withdrew to their chamber "for the purpose of allowing the House to deliberate on the question," themselves being decided against the right of Congress to interfere with the proceedings. In both bodies motions were offered and discussed, but in the Senate they were withdrawn, and in the House they were indefinitely postponed; thus showing that, whatever may have been the opinions of individuals, Congress were clearly against them.* The Senate, in fact, ordered their journal changed, and all note of the irregular proceedings expunged "so far as respects the counting of the votes," in order that their action should not be considered a precedent, which is positive evidence of their opinion that their withdrawal had been illegitimate and unconstitutional.

Now the principle which the objection was designed to establish is shown by the resolutions. In the Senate the resolution was "that Indiana had a right, by her Electors, to vote for President on the first Monday in December last"; that was all,—a simple expression of the opinion of that House on her position as a State of the Union, which

* The proceedings *in extenso* appear in Appleton's "Presidential Counts."

the Constitution had empowered Congress to decide.* In the House the resolution was, "that the votes of Indiana were properly and legally given, and therefore *ought to be counted*,"—the same decision as in the Senate, with the addition of a recommendation to the President of the Senate to count them. There is no mistaking the force of "*ought to be counted*." They had the day before adopted a resolution "that the two Houses *shall assemble*," etc., and were familiar with the proper terms by which to express an order or command; and the wording of their resolution amply proves the intent of making a recommendation only, as do all the other proceedings. Not a suggestion was made by any one of the right of the Houses to canvass and count the votes, and even the right of objecting to the reception of a vote in a mandatory way was decided adversely, and supplemented by the formal notification certificate of a "count" by the President of the Senate above mentioned.

1821.

Congress again followed the mode of action prescribed in 1793, but, prior to the Opening, a question arose and was debated, similar to that of Indiana in 1817.

Missouri had organized as a State in 1820, under the famous Act known as the "Missouri Compromise," prohibiting slavery north of "Mason's and Dixon's Line." She had inserted in her constitution a provision, authorizing her Legislature to enact a law, "to prevent free negroes and mulattoes from coming to and settling in said State, under any pretext whatever." Because of this she had not yet been recognized as a State by Congress, and she was not formally admitted into the Union until August 10, 1821. Nevertheless she had appointed Electors, who had cast and transmitted their votes.

In anticipation of the question of their reception, which was to be raised at the Opening, and in order to avoid the difficulty which occurred in 1817, and the unlawful separation of the Houses, a resolution was adopted by way of a compromise, providing that the result of the election should be announced to the Houses with Missouri's votes both counted and uncounted. Such a method of procedure is not only absurd, but it is unconstitutional,† and its

* Chapter iii., p. 39.

† Chapter ix., p. 204.

employment here is only defensible on the ground that it was an effort to avoid a greater infraction of the Constitution at the canvass of the votes.

It was during the debate on this compromise that Henry Clay made the first recorded claim of a *casus omissus* in the Constitution. It has been heretofore demonstrated by a variety of arguments that this claim is unfounded,* but the remarkable feature of Mr. Clay's assertion is not in the fact of its incorrectness, but in the fact that it was made at all, under the peculiar circumstances. He affirmed the right of the President of the Senate "to open and count the votes," but denied his right "to decide the question of the legality of the votes," that is, to canvass them. Unquestionably the latter right was not devolved upon Congress, and therefore, he argued, there must be a *casus omissus*.

In rendering that judgment he was possibly betrayed into error by a want of thought, or the excitement of the moment; for it is obvious that he failed to grasp the substance of the principles he was discussing, as Congressmen frequently have done.† The question really involved at this juncture was, Have Congress the right to declare whether or not Missouri is a State? Unquestionably they have, by Art. IV., Sec. III., 1 of the Constitution, and, that done, her votes would have been accepted or rejected accordingly. Mr. Clay either overlooked this, or perceived that it was useless or harmful to raise that question in the then existing political attitude of the Houses. Taking his speech as a whole, apart from the untenable claim of a *casus omissus*, his conclusions are correct and statesmanlike. He maintained the right of Congress to declare what shall be a legal vote and a legal "State"; he denied the right of the Houses to separate or canvass at the Opening; he affirmed the right of the President of the Senate to open and count the votes under a law, and he urged on Congress the duty and necessity of framing a suitable law. His statement of these rights, powers, and duties is thus seen to coincide with the previous conclusions of this treatise.

Notwithstanding the adoption of the joint rule, when the votes of Missouri were reached their reception was objected to by a member of the House. On motion the Senate retired, to which proceeding general exception was afterwards made, but no revisory action was

* *Vide* pages 26, 28, 30, 54 and 57.

† Chapter i., page 21, and Chapter ix., page 197.

taken as in 1817. The House discussed the question *pro* and *con*, the motion being "that the votes ought to be counted," and finally laid it on the table. The Senate returned, and the result was announced in accordance with the compromise resolution, amidst objection, confusion, and disorder.

During the progress of this debate the position assumed by Mr. Clay was defended, but it was more ably assailed by members who clung to the faith of the Fathers, and the Houses sustained the latter. The point in dispute was the right of the President of the Senate to "canvass"; his right to "open and count" was unquestioned. We thus see the entrance of new theories into the proceedings of the Houses at the Opening of the Votes, but thus far not accepted. The "negro question" was at the bottom of this innovation, and it has pertinaciously intruded itself again and again, even into the canvass of 1877, and always with the result of violating the Constitution.

Both the confusion of thought and action on the part of the Houses have a simple and patent explanation. The real question at issue was, Is Missouri a State, until recognized by Congress? It should have been settled beforehand, and then all difficulty would have been obviated. The result of the failure to dispose of it was, that if the President of the Senate at the Opening of the Votes either accepted or rejected Missouri's return, he practically determined her political *status*, and that by an arbitrary judgment, which there were plenty of members present to object to, but none who understood or could remedy. It is apparent that the question of a "canvass" could not legitimately arise at this point, for the vital question was not, Who shall canvass or count the votes? but, Who shall determine the *status* of Missouri? A determination by the President of the Senate would have been a usurpation of the prerogatives of Congress; that they perceived, but they did not recognize the principle underlying it, and therefore, like inexperienced hounds, they gave tongue on a false scent.

Under these circumstances Henry Clay's resolution was a valuable expedient, and its execution was most judicious. It was indeed a *quasi* law, and aimed at determining the question in advance; but it manifestly lacked the efficaciousness of a general Act, defining the word "State" categorically, which can be made without reference

to particular cases or special political conditions, and be operative always.* Clay was too profound a statesman not to recognize this, and, whilst admitting that the Houses had resolved to "get around" this case, he emphatically pronounced his judgment in favor of the enactment of a statute to regulate such matters in the future.

The proceedings being concluded, Congress sent the customary "notification certificate" to the Vice President-elect, containing a record of the opening and counting of the votes by the President of the Senate.

At the next session of Congress a committee was appointed under a "resolution to inquire whether any, and if any what, provisions are necessary or proper to be made by law to meet contingencies which may arise from unlawful, disputed, or doubtful votes." In due course they reported "that the committee have had the resolution under their consideration, and are of the opinion that it is inexpedient to legislate further on this question at this time." As heretofore observed,† Congress had, as they deemed, profounder and grander questions pressing upon them during this second "electoral period," and therefore relegated these trifles to the settlement of futurity.

That effort to remedy the "*casus omissus*" having failed, resolutions were introduced in 1823 proposing amendments to the Constitution, which devolved on the Houses the power of canvassing the votes.‡ At the outset they did not ask for the power of "counting," for they knew it to be a function of the President of the Senate, and they had not yet conceived the brilliant idea that it is "an affirmative act." Knowing that the power of canvassing was not vested in them, they asked for it in the plainest terms and without dissimulation.

1825.

In 1825 a variation was made in the provisions of the concurrent resolution, and a clause similar to that added in 1801 was inserted, to anticipate the non-election which was about to take place. In this resolution is observable the first departure from the custom, established in 1789, of the adoption by each House of a resolution specifying their

* *Vide "A New Law," sec. i., Chapter xiv.*

† *Chapter i., page 18.*

‡ *Chapter xii., page 261.*

separate action at the Opening, and it is apparent that they are slowly gravitating towards a "joint convention."

The records indicate an unnecessary ignorance on the part of the Houses, as well as on the part of the committee who framed the resolution. And they also explain the facility with which customs were changed by the false facts carelessly produced in support of them, and the ease with which Congress was led by a "precedent" and by members who were supposed to be familiar with the business intrusted to them.

The President of the Senate gave the lists to the tellers to read, and duly announced that there was no election of President, and that John C. Calhoun was elected Vice President. Accordingly a "notification certificate" was prepared by Congress, and for the last time, in which the President of the Senate declared, over his hand and seal, that he had officially opened and counted the votes in the presence of the two Houses. We are not surprised to see this form disappear, for it only followed the departing footsteps of more than one of the original practices under the Constitution.

1829.

In 1829 the arrangement for assembling the Houses blunderingly followed the last precedent, although the situations were entirely different. Here two innovations were introduced. The President of the Senate confined his duty to "breaking the seals" of the lists, and the tellers "opened and read them"; and then one of them, "retiring to some distance from the chair," announced the state of the vote. The increasing importance of the tellers is gradually unfolding itself.

1833.

In 1833 the Senate appointed a committee to prepare a resolution fixing the time "when the Senate will attend the House for the purpose of witnessing the examination of the votes." The House appointed "a committee to read and enumerate the votes." The House also notified the Senate that they "were ready to proceed to the counting of the votes."

The fact is very clear from an inspection of all these records, that the language of their clerks is eminently unreliable as an index of the

sentiments of the Houses upon the question of counting the votes. Only when they copy the formal documents, as in the case of the "notification certificates," can we be assured of their genuine opinion.

The late definition of the word "ascertain" is apparent from the minutes, which note that the result "was ascertained to be" so and so,—that is, "discovered to be,"—instead of "established."

1837.

In 1837 the resolution in the Missouri case was re-enacted to apply to the case of Michigan, and for the first time the President of the Senate was made "the presiding officer" of the "joint convention." This was done in order that he might execute the concurrent resolution without a separation of the Houses, but it is wholly indefensible.*

The case of six deputy postmasters who had voted as Electors was discussed, and their votes agreed to be illegal, but they were nevertheless counted. Congress evidently discredited their own powers in the premises, but, after the compromising manner of that day, they reached no conclusion. This is the only occasion on which the subject of ineligibility is referred to until 1877, though doubtless ineligible persons were often appointed and served. The States had no specific law to guide them, elections were not close nor investigations searching, and everybody appears to have been in that happy frame of mind which is willing that the Electoral System should execute itself. Even Joseph Story was infected by the enervating political atmosphere, and seduced into an expression of the opinion that it seemed to be taken for granted by the Framers of the System that nothing was to be done but to open the certificates and count the votes as transmitted.†

The President of the Senate announced that the two Houses were "convened to count the votes," and he proceeded "to open the votes and deliver them to the tellers, in order that they may be counted."

The gross solecism committed by the use of the expression "to open the votes" as meaning "to unfold the lists," seems not to have been observed.‡

The extraordinary announcement of the result of the election was

* Chapter ix., page 200.

† Chapter viii., page 186.

‡ Chapter vii., page 155.

made, that there "would be 170 votes were the votes of Michigan to be counted, and 167 votes if the votes of Michigan be not counted."

1841.

In 1841 the House notified the Senate that they "were ready to proceed in opening the certificates and counting the votes," which is another example of carelessness or stupidity.

The President of the Senate "opened the certificates, and the tellers read, counted, and registered *the same*, making duplicate lists, compared them, and delivered them to the President of the Senate."

In such wise the ignorance and indifference of this generation were making precedents, which succeeding Houses were not slow to appropriate as established law.

The President of the Senate was again made the "presiding officer," the last precedent being blindly followed; this innovation had much to do with leading the Houses to the belief that they were a "joint convention," empowered to canvass the votes. The tellers at this date read the certificates as a matter of right, that duty being entirely abandoned by the Vice President.

1845.

In 1845 the President of the Senate stated "the object of thus assembling to be to count the votes; and, handing one of the tellers a sealed packet, he said, 'I deliver to the gentlemen tellers the votes of the State of Maine, in order that they may be counted.'" That perfunctory execution of his duty by Mr. Mangum deserves notice as the only sensible and consistent method of treating an electoral certificate recorded of a President of the Senate, who regarded his function to be that of "breaking the seals." That being the business of a clerk, he permitted the clerks of the Houses to perform it, his example being followed in 1853.

They took the "packet," and, "having broken the seals, the tellers examined the votes." We now see the tellers of the Houses in full exercise of the constitutional functions of the President of the Senate. He no longer officially "receives certificates,"—he takes care of packets; and it would be ridiculous to go through the farce of *officially* breaking their seals.

The fact is, every one present was cognizant of the result of the election,

and knew it to be overwhelmingly in favor of Polk and Dallas; therefore the solemn duty of the Vice President sank into a commonplace formality, and he threw off all responsibility. Thus one infraction of the Constitution led on to another, and others still were to follow in their train.

And thus the precedents quoted as authority to-day were forming!

1849.

In 1849 the President of the Senate was again made "the presiding officer of the joint assembly." He arose and said:

"In obedience to law, the Senate and House of Representatives have assembled so that I may fulfil the duty, enjoined upon me by the Constitution, of opening the certificates, cause the votes to be counted, and have the persons elected ascertained and declared agreeably to the Constitution."

He evidently thought that he was faithfully executing the law of 1792, and his obvious mental confusion is perhaps attributable to the fact that, with "the aisles and galleries densely crowded with ladies and citizens, the hall presented an imposing appearance," as the clerk of the Senate gravely records.

The custom was on this occasion instituted of the reading of a certificate by the teller representing the party for whose candidates the votes were known to be cast.

1853.

In 1853 the old resolution of 1793 was adopted, with the addition of the creation of the President of the Senate *pro tempore* as the presiding officer of the joint meeting.

At the Counting of the Votes ("opening" is not referred to), he performed no function, but handed the packets to the tellers, who "read the certificates and reported and recorded the votes." The tellers now seem to be the general managers of the proceedings, being the only persons who are conversant with "precedents," and know what ought to or will be done. Everything seems to have sunk into uninteresting and spiritless formalities, so that even the clerks did not have energy sufficient to record the actual proceedings, but copied *verbatim* from the journal of 1849.

1857.

Again the President of the Senate was appointed a presiding officer of two bodies, which would be sure to spurn his authority if asserted; for by this time the presiding officer was a minor official in the eyes of Congress, and far less important than their clerks, the tellers. "The Presiding Officer" now appears on the journals in the stead of "the President of the Senate." He said :

"Pursuant to law, and in obedience to the concurrent order of the two Houses, the President of the Senate will now proceed to open and count the votes."

"The presiding officer thereupon proceeded to open and hand to the tellers the votes of the several States.

"Senator Cass said: 'I suggest that it is better to read the results of the votes, and not the certificates in full.'

"The presiding officer replied: 'The presiding officer considers that the duty of counting the votes has devolved on the tellers; and he further considers that the tellers should determine for themselves in what way the votes are verified to them, and read as much as they may think proper.'

One cannot help reverting to the Count of 1797, when old John Adams boldly declared himself officially privileged to select his own method of opening and counting the votes!

When the vote of Wisconsin was read, its reception was objected to because it was not cast on the appointed day.* Debate was ruled out of order. A request to make a motion was ruled out of order. The result of the votes was announced, including that of Wisconsin, and the President and Vice President duly declared.

Then began a debate in defiance of the ruling, confused, protesting and vociferous, during which the presiding officer and the members bandied contradictions, decisions were made and disregarded, appeals were made to the Speaker of the House, and the Senate retired in great disorder. In the midst of these proceedings the tellers, who felt their importance, put their heads together, and thereafter one of them arose and delivered himself as follows:

"I am instructed by the tellers to state to the president and to the

* Chapter v., page 124.

convention, that they have not yet signed this certificate (the list of the votes), and that they have determined to sign it only when it sets forth all the facts."

These were the tellers appointed in 1789 and 1793 "to sit at the clerk's table and make a list of the votes as the same were declared by the President of the Senate!" It had now become necessary for them to *certify* the result of the election, as would appear.

There then followed a long and heated debate, which displayed much ignorance of the Constitution and a great deal of assumption,* during which the presiding officer declared that he did not intend to decide the question. In fact, he did decide it, however, and under the words of the Concurrent Resolution of 1793, which, executed rigidly, made him the official canvasser of the votes. Congress subsequently recognized him as vested with that function, and there is no doubt that he was justifiable in his ruling, which was not arbitrary, but in execution of the Resolution, as he explained it. The debate issued in the customary failure of the Houses to decide the question, though they finally leaned towards the right of the President of the Senate to canvass and count the votes.[†]

A number of points are settled by the discussion of 1857, which are worthy of note. 1. The ignorance of many members of Congress as to the merits of the question is amply displayed, as well as their unacquaintance with the early proceedings at the Opening of the Votes, the spirit of the Electoral System, and the intent of its Framers. 2. The Houses had not yet decided it to be their right to canvass the votes, and did not then determine it. 3. There were distinguished advocates on both sides of the question. 4. It was admitted, and not denied, that it is the function of the President of the Senate to "count" the votes. 5. Again and again the necessity of a comprehensive law was indicated, under which he might appropriately determine the validity of returns. 6. It was an arbitrary decision, on the one hand by the President of the Senate, and on the other by Congress, to which exception was taken, and not a decision under the

* Chapter viii., page 183.

† Extensive extracts from the proceedings appear in the Appendix, in order to exhibit the range of the debate, the actual opinion of the Houses, which has been frequently perverted, and the utter want of order, system, and efficiency resulting from the ignorance of Congress and the absence of a suitable law.

terms of a statute. 7. This is the only occasion in the history of the nation upon which the general question of Congressional authority involved in the case was discussed from the abstract standpoint of constitutional authority (all later debates being the offshoots of demagoguery or partisanship), and an able and unbiased Congress in effect affirmed their only duty to be the enactment of an executive law.

1861.

At the Opening of the Votes in 1861, it was expected that Breckinridge would claim the right of counting, following the precedent of 1857. The Republicans therefore openly asserted the power of the Houses, and assumed the function of "canvassing." Instead of the phrase, "a mode of examining the votes," which was contained in the resolution of 1793, they substituted, "a mode of canvassing the votes," —this being the first time that such a power was either affirmed or exercised by Congress. It was the beginning of an entirely new order of procedure.*

1865.

On the 30th of January, 1865, in anticipation of the presentation of electoral votes from Louisiana and Tennessee, the "22d Joint Rule" was surreptitiously passed. It has already been sufficiently examined.† The bill declaring eleven States "not entitled to representation in the Electoral College" was also extensively debated, and, under pressure, signed by the President. It is unnecessary to refer to it here, further than to say that its terms do not accord with the Constitution.‡

When the appointed time was come, the Vice President said:

"The Senate and House of Representatives having met, under the provisions of the Constitution, for the purpose of opening, determining, and declaring the votes for the offices of President and Vice President," etc.

This was the first occasion whereat the President of the Senate dared to interpolate words in the Constitution, and officially ascribe such a power to the two Houses; and it was done for the purpose of rejecting the votes of Louisiana and Tennessee.

* Chapter i., page 19.

† Chapter xii., page 271.

‡ Chapter vi., page 141.

When the votes had been read and recorded by the tellers, it was decided, on an objection to those from West Virginia,* that they were then to be regarded as "announced and declared." The loss of one vote by the absence of a Nevada Elector was announced by the Vice President, and no action was taken upon it.

The production of the returns of Louisiana and Tennessee before the Houses was demanded, and refused under the Act of 1865. Compared with the difficulty and disorder in 1821, 1857, 1869, and 1877, we have here a capital illustration of the harmonious execution of their duty by all parties, even in the face of a decided partisan opposition, which results from the existence of a law. This is the first instance of the rejection of the votes of a State by Congress, and it was done not by a canvass of the returns by the Houses, but by the President of the Senate, agreeably to "the law of the land."

1869.

In preparation for the presentation of the electoral vote of Georgia in 1869, a concurrent resolution was adopted, reviving the Missouri rule of 1821, requiring it to be counted if it did not change the result of the election, and not to be counted if it did change the result.

When the Houses were met, under the 22d Joint Rule, the President of the Senate repeated the words of his predecessor in 1865. When Louisiana was reached, her vote was objected to, because "no valid election of Electors had been held in that State." The two Houses separated, determined the question without debate, and each resolved to count the votes of Louisiana; therefore they were recorded.

When Georgia was reached, the reception of her votes was objected to on four grounds, the chief one being that they were not cast on the appointed day. The concurrent resolution was disregarded, amid jeering and laughter, as it had been in 1821, and the Houses separated. The situation was indeed a ridiculous one, and made more so when the Senate decided that "the objection was not in order," and the House decided "not to count the votes." The proceedings became farcical, the Senate filing into the hall of the House during a forced roll-call. The Vice President announced the decision of the Senate, and then began a scene worthy of any bedlam, the Speaker of the

* Chapter ix., page 195.

House being compelled to employ the sergeant-at-arms to quell the disturbance. But it could not be quelled, and therefore, whilst the uproar continued, and the Vice President pounded on his desk, the result was declared by the tellers. The Senate retired, and the House vented its rage in a debate that lasted four days.

We have here an excellent example of the issue of a canvass by the Houses, when they happen to be divided in sentiment. Justice is likely to be ignored, and the rights of one or the other must be trampled upon. To provide that two equal and independent bodies shall canvass the votes, is an absurdity of which the Fathers would never have been guilty; it subverts every political and parliamentary principle, as well as the dictates of common sense.

In 1869, the Houses canvassed the votes of the Electors for the first time, though their right to do so had been under discussion for seventy years.

1873.

In 1873 the 22d Joint Rule was again in force by the consent of the two Houses.

Several days prior to that appointed for the Opening of the Votes, a Senate committee was appointed to inquire into "the recent election of Electors in the States of Louisiana and Arkansas." They duly reported in favor of what they termed "the Grant Electors," and against "the Greeley Electors." These dual returns, prophesied in 1800 as the inevitable result of such a law, were invited by the 22d Joint Rule.

The Vice President acted as "the presiding officer of the joint convention." It may be recalled here that, in the beginning, the two Houses met together, but preserved their autonomy with jealous care; that during the second period they at times endeavored to convert themselves into conventions; and that in 1861 this custom was finally adopted, both branches having political majorities of the same complexion. In 1837 they appointed a "presiding officer" for the first time, and in 1857 they repudiated the idea of a joint convention.

When Georgia was reached, three of her votes were objected to "because Horace Greeley, for whom they appear to have been cast, was dead at the time said Electors assembled to cast their votes."

The votes of Mississippi were objected to because "it does not ap-

pear from the certificate of said Electors that they voted by ballot." One vote of Mississippi was objected to because the certificate of its caster's appointment, under State laws, to fill a vacancy, was not certified to by the Governor.

Under the Rule, no debate either in the "joint convention" or in their respective chambers was permissible. Upon re-assembling it was announced that the Senate (strangely enough!) had decided to count the votes for Greeley, and that the House had decided not to count them; under the rule, therefore, they were counted. Not only the absurdity, but the bad effect of this bad Rule are here apparent. On any account, without debate, without reasons, and without agreement, the representation of a State might be defeated. This is the first case in which Congress rejected a vote by arbitrary judgment, and it was done by the vote of 46 Senators against 200 Representatives.

The votes of Texas were objected to because the appointment of the Electors was not certified to by the Governor, and because four of them, less than a majority, had elected four more to take the place of absentees. Both objections were overruled by both Houses, and the votes were counted.

When Arkansas was reached, the Vice President stated that there had been presented to him two returns from Arkansas, one of which "he would not receive, even informally."* The other certificate was objected to "because the persons certified as elected were not elected as Electors," and "because the returns read by the tellers were not certified according to law."

The two certificates from Louisiana were severally objected to on a number of counts by both Republicans and Democrats, there being seven objections altogether, "some of them against receiving any vote from that State."

When the Houses had re-assembled, it was announced that the Senate had voted "nay," and the House "aye" on the Arkansas returns, which were therefore not counted. It was subsequently admitted that this was a blunder on the part of the Senate, into which they had been led by the prohibition of all debate under the Joint Rule. The objection was that the seal of the State was not affixed to the Governor's certificate, and when a proposition to ob-

* Chapter vi., page 147.

tain the necessary evidence was made, it was ruled out as of the nature of debate. The following explanation, made by Senator Logan, February 25, 1875, fitly rounds off our commentary:

"It turned out that Arkansas had no seal of State; that the only seal she had was the seal of the Secretary of State; and the certificate was stamped with that seal. Upon that frivolous objection the State of Arkansas was refused to be counted in the last Presidential election. It only showed that any objection made, however frivolous, by one House might deprive a man who has been elected President of the United States of his right to the office, or might deprive a State or States of their right to vote."

The Houses "concurred" in "not counting" the votes of Louisiana, and they were therefore rejected.

Here are two decisions, standing side by side in the "Annals," which illustrate the utter absurdity of a Congressional canvass. In the Arkansas case the Houses disagreed, and the votes were rejected; in the Louisiana case the Houses agreed, and the votes were rejected. This was under the Rule, which required a concurrence of the Houses to "admit" a vote objected to. Now, as to the rejection of a vote, under such a rule, there are only two things possible for the Houses to do, to wit, to agree, or to disagree; here they did both, and the votes were accordingly rejected. On what principle of justice, reason, or law these two diametrically opposite acts are made to accomplish one and the same end, is certainly beyond the comprehension of any one but a member of Congress. And should the law require a concurrence of the Houses to "reject" a vote, as did the Act of 1877, the same absurdity presents itself.* Both Houses may vote to admit it, or one may vote to admit and the other to reject it, and in either event it is counted. Yet one of these methods, requiring a concurrence to admit or reject, has universally been the rule proposed or employed. In fact, thus only can the two Houses canvass the votes,—at the sacrifice of all rational and equitable principles.

Another view of these proceedings is in point. From an inspection of the record it will appear that Congress could scarcely have devised a more ridiculous and cumbersome method of canvassing. On this occasion the votes of five States were objected to, and their Rule re-

* *Vide* the Pennsylvania and Rhode Island cases in 1877.

quired the disorderly separation of the Houses, with a concomitant loss of five hours' time and a *quant. suff.* of patience, in order to accomplish what a suitable statute would have effected in five minutes.

Attention is also called to the fact that the record exhibits the pointed recognition, by both parties, of the Governor's certificate, as the legal evidence of the State's appointment of Electors. This is noteworthy in view of the proceedings in 1877, and it may be added, that prior to 1877 the authority of the State's certification, pursuant to the Constitution and the Act of 1792, was never drawn in question.

The Count of 1873 has the doubtful honor of furnishing the first case of the rejection of a vote by means of a Congressional canvass.

1877.

In 1877 the Houses proceeded according to the forms of the "Electoral Act," which has heretofore been examined,* and which was devised for this occasion only. It changed the Opening of the Votes from "the second Wednesday in February" to "the first Thursday in February." For the first time two tellers were appointed by the Senate, and an "Electoral Commission" appointed by the Houses to execute the function of canvassing for them, which they found themselves suddenly unable to accomplish.

Dual returns from four States were sent to the "Commission," and decided by their Republican majority of one (eight to seven), and the subsequent objections to the decision were overruled, by the vote of the Republican Senate against the Democratic House. The general principles heretofore educed by this dissertation sustain the reception of the returns from Florida, Louisiana, and South Carolina certified to by the Governors of those States, but they repudiate the basis of the Commission's decision ("the determination of their, the Electors', appointment by the returning officers for election") and the partisan action of both Commission and Houses. The illegal decision in the Oregon case, in rejecting the authority of the Governor's certificate, has already been pointed out,† and it only remains to compare the Republican position in 1877 with their position in 1873, when it was held as follows:

"The third section of the Act of Congress of 1792 declares what

* Chapter xii., page 276.

† Chapter iv., page 108.

shall be *the official evidence* of the election (*sic*) of Electors, and provides that 'the executive authority of each State shall cause three lists of the names of the Electors of such States to be made and certified, to be delivered to the Electors on or before the first Wednesday in December, and the said Electors shall annex one of the said lists to each list of their votes.' The certificate of the Governor, as provided for in this section, seems to be the only evidence contemplated by the law of the election of Electors and (of) their right to cast the electoral vote of the State."

The very close vote at the election of 1876 caused the discovery of a number of persons, who had been commissioned, or who had acted, as Electors, holding "offices of profit or trust under the United States." Being Republicans, their votes were accepted. Four of these cases have been examined in Chapter IV., and the principles underlying "ineligibility" fully set forth; they will therefore be passed over here, and an outline argument must suffice in the other three cases, concerning which the Houses disagreed.

If the facts were true in the objection to the vote of D. L. Crossman of Michigan, it was unquestionably sound. He was elected by the college to fill an alleged vacancy, occasioned by the unwitting selection of an officer of the United States as an Elector. In pursuance of the Act of 1845, the State statute had provided for the filling of vacancies occasioned by "death, refusal to act, or neglect to attend the college"; but in this case the alleged vacancy occurred by reason of a failure to appoint, and therefore the statute did not apply. Crossman's vote should have been rejected.

The objection to the invalid vote of Pennsylvania was justifiable. Morrell, the person elected by the people, was ineligible; he refused to attend the college, which thereupon elected H. A. Boggs to fill the alleged vacancy, and his vote was transmitted. Under the Act of 1845 the States are authorized to "appoint" at a subsequent time in case of failure to make "a choice." But in this case, firstly, a lawful choice was made, and there was therefore no vacancy which the Electors could fill under their statute; and, secondly, an election by Electors is not an appointment under the Constitution, which the United States can recognize. Under both the Act and the Constitution, therefore, the vote was void, and it should have been rejected.

In the Rhode Island case, on the contrary, the Legislature made

the second choice, when the first was found to be illegal because of ineligibility, and, if W. S. Slater was duly commissioned by the Governor, the appointment was valid. Under the Constitution the State had a right to make the appointment at her own option, and a choice by the Legislature was recognized universally and exercised for years after the formation of the Union.* The Act of 1845 was violated in this case, which is immaterial, however, for its terms are unconstitutional.

The cases of the burlesque return from Louisiana, of the absence of registration in South Carolina, and of the fictitious return from Vermont, have been heretofore duly considered.†

The termination of the unprecedented and unwarranted proceedings, at the Opening of the Votes in 1877, was reached at four o'clock A.M., March 2, the Houses having been (constructively) in session since the 1st of February at ten o'clock. It is only necessary to say of them further, that they were, almost from first to last, an outrage on justice and propriety, on the Constitution and on the people of the United States. Starting with the false assumption that the Houses have a constitutional right to canvass and count the votes, they were marked throughout by a disregard of law, order, and the popular will. In the decisions of Congress, the result was a political victory of the Senate over the House; in the Commission, the decisions were made by the Republicans against the Democrats; as respects the people, their will was overthrown by their own Representatives; and as regards the Presidency, the office was usurped by the defeated candidate through the instrumentality of fraud.

And the President of the Senate executed his responsible and exalted function of Opening the Votes, by ceremoniously taking them out of "a strong box" and solemnly "breaking their seals!"

No more fitting conclusion to the Count of 1877 could have been provided, than the House resolution of March 3, which repudiated the "Commission's" decisions, their confirmation by Congress, and the *de facto* President, and declared that "Samuel J. Tilden and Thomas A. Hendricks were duly elected President and Vice President of the United States."

* Chapter xii., page 259.

† *Vide* pages 65, 75 and 166.

CHAPTER XIV.

ELECTING A PRESIDENT.

"The basis of our political system is the right of the people to make and to alter their constitutions of government; but the Constitution which at any time exists, until changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all."—GEORGE WASHINGTON.

A NEW SYSTEM.

By reason of the false interpretations of the Electoral System, which have been heretofore fully demonstrated, so many difficulties and dangers have obtruded themselves upon the public, that there is a wide-spread impression of the need of an entire revision of the Constitution touching the election of Presidents. It is not surprising that this is the popular view, and yet it is manifest, from our consideration of these matters, that it is a wholly mistaken one. Though many a flaw has been alleged to inhere in the existing plan, our examination has failed to discover one.

The System to-day occupies the position of man to his Maker,—made upright and perfect, and placed in the very Garden of the Lord, the American Republic, to cultivate and ennable it. But the powers of darkness, intrigue and corruption, have assailed and seduced it; it has fallen from the estate wherein it was created, its duty is unfulfilled, and the garden is choking with weeds. Therefore its author, the people, begin to repent its existence and to say, Let us destroy it from the face of the earth. In only one way can it be done, and that is by opening on the land the flood-gates of a popular election; to that resource all the advocates of its overthrow have been driven, and yet it is an awful alternative to contemplate. Eight, twelve, twenty millions of people engaged in a struggle every few years to seat one man in the Presidency, would be a cataclysm worse than the Deluge, and it would engulf this nation so deeply that Peace would never again find a resting place for her foot.

It is impossible, in the limits of this treatise, to discuss in detail the proposed popular scheme, and therefore a few of the leading arguments of its advocates will merely be glanced at.

It is asserted that the popular system would be more consonant to republican principles, but this is not true. A republican government is self-government by representatives, and the existing plan of electing Electors to choose a President conforms to it exactly, whilst a choice by the masses would not. The latter is more accurately a democratic system of government, and it would conflict with other established forms of the Constitution, which provides for the choice of the Government through the medium of the States.

It is held that the principle of universal suffrage requires the direct choice of the President by the people over whom he is set. Were he the maker as well as the executive of the laws, this might be true; but in fact his executive duties consist in enforcing statutes devised by Representatives, who are not chosen by the nation at large, and by Senators, who are the choice of the several State governments. If the people, as a nation, desire a choice of the powers that be, the election of a national Legislature by general ticket will meet their view, while that of a President will not.

It is maintained that the people are more honest, and that the election will therefore be purer. But what are the facts? Since the foundation of this government a case has never transpired, where an Elector has sold his vote or betrayed his constituents. Could a purer system than that be devised? This is the effect of the representation of the people by their chosen Electors, and could a more perfect representation be desired? The existing corruption is not caused by either the Electors or the people, but by the conventions, parties, and political leaders, and by the vicious customs grafted unlawfully on the original System. If these be abolished, purity will follow without a change in the plan of election. But, under our form of government, it is impossible to abolish the conventions and parties, and, in the event of a popular choice of President, they would be more extensive and rampant than ever, and the election proportionately impurer.

Not an argument heretofore propounded, in favor of a popular election, will stand the test of a criticism; they are hollow, visionary, unsubstantial, and are dissipated by the first glance of the sunlight of fact.



In truth, the necessity of such a change is the figment of a wandering imagination, and an anomalous conception in this practical age and nation. If a popular choice is the desideratum, under existing practices we have it already; at the last election every person, who deposited a ballot, voted for one of the three Presidential candidates. The practical result of the popular mode could not be provided more fully by expunging the Electoral System, and the alleged lack of popularity is a fiction. Under these circumstances it is only ignorance and demagoguery that will demand a revision of the Constitution, stupidly or artfully urging that the people should have the empty form of a new system, whose substance they already possess.

The arguments against a popular election of President are numerous, profound, and convincing; they have been touched upon heretofore, and cannot be elaborated further.* They swayed the intelligent minds of a century ago, and they will determine the action of intelligent statesmen to-day. Omitting a consideration of their influence on the morality of the nation, Dr. Paley has sagely observed of their practical effects, that "nothing is gained by a popular choice worth the discussions, tumults, and interruptions of regular industry, with which it is inseparably connected."

A RECONSTRUCTED SYSTEM.

In addition to these revolutionists, these *sans culottes* of politics, who recognize no method of reforming the national customs but by guillotining the national laws, there is a class of reformers whose energies are devoted to a reconstruction of the Electoral System. Since there is no lack of ingenuity in this Yankee nation, it is not surprising that there is a plentiful supply of political as well as of medical Sangrados, who cut and saw, and blister and bleed, until, when their patient is thoroughly repaired, he is dead.

These are the statesmen who hold that the architects of the Constitution were also the creators of the Electoral System, and that therefore it must be the product of wisdom, though they scarcely know why. They look at the System in operation, and see a deformity here and an excrescence there, a want of vigor and a tendency to disease, and, in order to save it, they attack the visible symptoms,

* *Vide* pages 28, 32, 111 and 227.

neglecting the cause and necessarily failing to cure. At recurring short intervals they extract the skeleton from the Constitution and clothe it with forms and ceremonies, modelled after the pattern of their individual intellects, and present it to the public as a revised and reconstructed system. But the creature is spiritless and dead, and its ghastly grin is a mockery of the noble creation of the Fathers.

It was not thus that the Convention of 1787 founded the Electoral System. Master-workmen, they modelled it according to a pre-conceived plan, founded on pre-arranged principles, and when complete it was a suitable tenement for the spirit which was designed to vitalize it. That spirit we have discussed, and have found that it and the System are perfectly adapted to each other, and linked and cemented together; therefore we are assured, that any attempt to divorce them will destroy their vitality. If weakness or corruption has crept into its execution, it must be cured by attacking the cause of the malady, and by carefully respecting both the body and soul of the constitutional plan. That is the only sound and scientific method of treatment, and a practical test will demonstrate the fact, that existing evils may thus be, and only thus can be, removed.

It is not possible to examine, in this connection, any of the electoral schemes which have been formulated and published since the election imbroglio of 1876. It is sufficient to say of them that, though new and ingenious and attractive, they are lacking in the substantial virtues of the genuine Electoral System, and that they lose sight of the fundamental principles upon which it is and must always be based.

In a letter of March 24, 1834, James Madison, with the wisdom that age and experience, as well as his connection with the formation and execution of the Constitution, had given him, sounded a solemn note of warning against the impolicy of amendments touching the principles of that instrument, during the heat and extravagance of political emergencies. The following words are pregnant with wholesome advice in relation to the propositions above referred to, and they will be indorsed by the cool and more thoughtful men of the nation:

"The Constitution of the United States may doubtless disclose from time to time faults which call for the pruning knife or the in-grafting hand. But remedies ought to be applied, not in the paroxysms of party and popular excitements, but with the more leisure

and reflection ; since changes, hastily accommodated to these vicissitudes, would destroy the symmetry and stability aimed at in our political system."

It is a question of the profoundest gravity, whether a change should be made in our plan of election, which would tamper with the principles involved in it. The result of this inquiry says, unhesitatingly, No!—not whilst our politics are in their present unwholesome condition; not whilst our parties are assimilating the new element of ignorance and venality introduced by the rebellion; not whilst our politicians are more likely to be demagogues than statesmen, and not until the genuine Electoral System has been fully and fairly enforced.

Should such a revision be undertaken, however, it is due to the paramount interests of this Republic that Congress should not supervise it. Only a commission of capable and disinterested men could handle the subject efficiently, whose scheme might be approved by a national constitutional convention before submitting it to the States for ratification.

A RESTORED SYSTEM.

That evils exist in our Presidential elections has been abundantly shown heretofore, and it is patent that they are generally recognized. It has been demonstrated that an immediate solution of the problem of purer elections is a comprehensive law, executory of the Electoral System. Nevertheless, it has also been seen that Congress have a tendency to usurp prerogatives and powers desirable but not granted, and it would appear from the history of their proceedings that only a definitive amendment to the Constitution will check it.

A suitable Amendment is, therefore, of greater intrinsic value than a suitable Act, for the latter will inevitably follow.

There are a few points in the existing System which do not involve its fundamental principles, and which experience has suggested as fitting subjects for amendment. The propriety of a change in two of them,—the length of the Presidential term and the re-eligibility of the President,—has already been extensively discussed, and seems to be firmly impressed on the public mind. Besides these, and more important than they, is a redefinition of the principles of the genuine System, which have been heretofore elucidated, and which have been

partially lost sight of during the growth of our illegitimate political customs, and partially changed by a foolish provision in the XII. Amendment.

To prescribe one term and an ineligibility to re-election is but the entering wedge of the reform which the country requires ; it most needs, and it ought to demand, a return to the purity of the original plan. It would seem that with a suitable amendment, and with a comprehensive law as suggested, the waters ahead of our Ship of State, on this tack at least, are smooth and inviting.

The following Amendment is therefore proposed as necessary, in part, to place our elections on a legitimate basis, to shed light on their darkness, and to straighten their crooked paths. In its entirety it offers a vigorous reform ; shorn of its third, fourth, and fifth clauses, the sources of its strength, by the craft of a political Delilah, the Philistines of intrigue, fraud and corruption must continue to ravage the System.

A PROPOSED AMENDMENT.

1. The President and Vice President of the United States shall be elected for a term of six years, beginning with the fourth day of March, A.D. 1881.
2. No person upon whom the powers and duties of the office of President of the United States have devolved, or who has acted as President for the last year of a term, shall be again elected to said office.
3. No nomination of candidates for the offices of President and Vice President of the United States shall be made by a convention or party prior to the choice of Electors by the States ; and no election of State officers shall be made within three months of the day appointed for the choice or election of Electors or Representatives of the United States.
4. Each State shall be entitled to a number of Electors of President and Vice President of the United States equal to the number of Representatives to which such State may be entitled in the Congress ; and in all the States the people of each Congressional District shall choose one of the said Electors.
5. The President of the Senate shall execute the ministerial func-

tions of receiving, opening, and counting the votes of the Electors agreeably to the laws of the United States.

6. When the right of choosing a President of the United States has devolved on the House of Representatives, such choice shall be made within twenty-four hours thereafter.

7. When the right of choosing a Vice President of the United States has devolved on the Senate, such choice shall be made within twenty-four hours thereafter.

8. When the House of Representatives have failed to choose a President of the United States within twenty-four hours after the right of such choice has devolved on them, the Vice President elected by the Electors, or chosen by the Senate, shall be President of the United States for the ensuing term.

ONE TERM OF SIX YEARS.

Sec. I. provides for a term of six years, which is an almost accepted fact, and it requires neither discussion nor elaboration here. It does not touch the principles of the Electoral System, but involves a policy merely, and perhaps a good one,—the longer release of the country from the evils attending our frequent elections. It is at this day doubtless impossible to restore the System to its pristine virtue of a choice of Electors only, without reference to the President to be selected, and a lengthened term will diminish the ill effects of existing unconstitutional customs.

Sec. II. provides for an ineligibility of the President to re-election; it rests on the same basis as a six-years term of office, and it is a change of possible, though questionable, propriety. The two provisions are inextricably linked in policy, however; for the former, without the latter, would ultimately tend towards making the incumbent of the office permanent, by increasing his power and lessening the popular interest in his election.

In framing the clause, regard has been had to the provisions of the Constitution, so that difficulty and injustice might be avoided. It provides for an ineligibility to a re-election of a President who has actually served; it provides for the non-election of a Vice President who has succeeded a President, which manifestly involves the same policy; it prevents a possible juggling between a President and Vice President, so disposed, to contrive the election of the latter by a crafty

resignation in his favor; and it prohibits the election of a person who has acted as President during the latter part of a term, which obviously is as legitimate a reform as the others.

The sole object of such an amendment being to prevent an incumbent from using the patronage and power at his command to induct himself again into office, it would be unjust to apply it to one who has temporarily "acted" in a case of Presidential disability; it would be equally unjust to apply it to an ex-President, who might be a Vice President subsequently by popular or Senatorial election, or who might be a President of the Senate *pro tempore* (or a Secretary of State, under a revised statute), at the time of a vacancy in the Presidency; therefore it is only provided that he shall not be again elected. From Art. II., Sec. I., Clause 6 of the Constitution is taken the phrase, "upon whom the powers and duties have devolved," which, in connection with the word "elected," effects the foregoing results.

In the letter to Robert Lee, bearing date of February 22, 1830, the venerable James Madison writes as follows:

"The question of re-eligibility of a President of the United States admits of rival views, and is the more delicate because it cannot be decided with equal lights from actual experiment. In general it may be observed, that the evils most complained of are less connected with that particular question than with the process of electing a chief magistrate."

Herein he struck the key-note of administration reform. An ineligibility to re-election is popularly regarded as embodying some sovereign remedy for the evils attending the administrations of our Presidents, and as the prime requisite in their purification. But it is patent from the very nature of the remedy, that it extends no farther than to preventing the employment of a President's power and patronage in his own re-election; it does not check him in their wholesale use in rewarding the leaders of the party through whose instrumentality he wins his election, nor in their employment to elect his partisan friends to the office. And yet these two possibilities are as likely to occur as the first;—more likely in fact, in view of the natural jealousy of political leaders against the incumbent of the office, and the insatiable desire to seat themselves in a chair to which their efforts in chief have elevated him.

Looking narrowly at the question, it is doubtful if a President will

ever be elected a second time unless the people demand him; and when they do demand him, it is questionable if they should be prevented from having him. The subject "admits of rival views," as Madison sententiously observes, and Judge Story, coinciding with the Fathers, has made a very strong argument in favor of re-eligibility.*

It is a significant fact that, in the seven cases wherein Presidents have been elected a second time, they have universally received not only a larger electoral, but a larger popular, vote than at their first elections; and the obvious inference is, that they re-enter the office, not by means of an intrigue, but by force of the popular will. It is, further, a question if any President could possibly re-elect himself by a prostitution of his honorable office to that end, without so exposing his plot to an argus-eyed public and press, that he would inevitably forfeit the popular support, which in truth is his main dependence. The vociferous uproar, maintained for the last few years against a third term, is an echo from the claptrap of an unsophisticated generation mouldered to dust many decades ago, and unworthy the superior enlightenment of the day. When "Cæsarism" vexes this nation it will come with the stride of a bold usurper, and not with the stealthy tread of a politician.

Still, Presidents doubtless have often endeavored, and will often endeavor hereafter, to effect a re-election by illegitimate means, and it may be wise enough to close this door on the possibility.

The subject of re-eligibility was extensively discussed in the convention which framed the Constitution, and the issue was an overwhelming majority in favor of it. For that convention was not composed of tinkers and cobblers, who could mend and patch, but who were incapable of manufacturing or inventing. They were extraordinarily sagacious statesmen, they adopted the broadest and grandest view of the science of government, and no one, capable of appreciating their motives and objects, can deny the admirable fitness of the means they selected to effect them.

The President, for whom they provided, was an able, eminent, and independent man, and the Electoral System, executed, will infallibly produce him; it is not by the error of the Fathers that dishonest, incompetent persons are placed in the office, but by the emasculation of

* Story's *Commentaries*, Sec. 1436 to 1443.

their plan of election. Having provided for the incumbency of a competent, and above all of an independent, Executive, they gave into his hands the extensive patronage and powers of the President, offset by the adequate check of amenability to impeachment. And then they limited his term to four years, the most suitable length, and offered him re-eligibility as the strongest inducement to an upright and generous execution of his functions.

Their aims and their measures were masterly, but the attainment of the former depends on the rigid execution of the latter. The aims and the measures of our modern statesmen are piddling in comparison ; for, first, they destroy the independence of their Executive by their mode of electing him, and then they degrade and disgrace him by eliminating his re-eligibility. The System of the Fathers will procure a pure and untrammelled President, worthy of the free people whose representative in chief he is to be. The scheme of their successors makes him the slave of his party, offers him every inducement to prostitute his office, and then binds his hands lest, free, they work too much injury. And for what ? Solely in order that they may control the patronage and power, which the Constitution has vested in him !

But the times and the manners must be taken into consideration, and therefore the question of a second term resolves itself into this : In a re-election to the Presidency it is self-interest which will dictate the policy of the candidate ; being the master motive of human action, it becomes additionally potent when aspiring to or occupying so exalted an office. Its issue may be good or evil. If the former, it will induce him to be honest, upright, and patriotic, for the sake of public approval and the transmission of an unsullied name to posterity ; if the latter, it will issue in dishonesty, servility, and an underhand traffic in offices, for the sake of a re-election. The latter as well as the former course is open to every President, whether his motives be high or low, and by erecting the barrier of a one-term amendment across the one, the other and better, it is probable, would be hereafter chosen. It is a probability, and an advantage to the nation, which ought not to be lost sight of.

From the standpoint of civil-service and administration reform, however, the remedy is but a superficial one at the best. The real reform, the specific remedy, is a purification of the "process of electing a chief

"magistrate," as Madison puts it; and that can be accomplished most effectually and speedily, by adopting the succeeding amendments proposed.

CIVIL SERVICE REFORM.

Sec. III. is devised and presented as a solution of the problem of civil service reform. It is not alleged that by it an absolutely pure conduct of this branch of the service will be obtained, but it is asserted that on it depends the possibility of such a reform, that every proposition falling short of it trifles with effects and neglects underlying agencies, and that, if the nation desires to attain a complete reform, it must begin with the excision of the primary cause of the prevalent corruption.

It must be patent to any close observer of national politics that the public mind, seeking the port of reform, is on a sea of doubt, in the fog of ignorance, without compass or rudder to guide it. But a compass is ready to hand in the Spirit of the Electoral System, and its cardinal points are the exclusion of the Government, the Congress, the people and political parties from all control over a Presidential election.* The amendment proposed is a suitable rudder, and the cynosure of their desires, when the fog drifts away, will be found to be the Independence of their Executive. When our Ship of State sails by that, according to the directions laid down in its great chart,—the Constitution,—it will have a safe and a prosperous voyage.

We complain of our maculate administrations, of their servile and vacillating actions, of the bargain and sale of political influence, of the arbitrary removal of worthy officials and the appointment of unworthy substitutes, of the bestowal of office as rewards for fealty and service, and of the control of the President's patronage by the chiefs of his party; in a word, we complain of a corrupt civil service, extending the length and breadth of the land; we see it, we deplore it, we pretend to improve it, but we never inquire of its cause. The genius of our statesmen has soared no higher than the wall of the unconstitutional "tenure of office act," which they built around Andrew Johnson. Presidential genius has taken no higher flight than the dung-hill of an order forbidding officials to take part in political movements, in derogation of their indefeasible rights as citizens. And the genius of

* *Vide page 29.*

the people is sitting in despair in the midst of the ruins of the "civil service commission," whose foundation rested on nothing and crumbled before it was laid. This is fatuity, a criminal neglect of the first principles of reform, and it is time that reason resume its sway.

Our administrations are impure because their election defiles them, by violating the fundamental principles of the Electoral System; an unconstitutional mode of election cannot provide a constitutional President, an independent Executive, and the popular method in vogue is unquestionably unconstitutional. Our Presidents are servile, because, having risen to power by the unlawful influence of political chiefs, instead of by an untrammeled choice of the Electors, they stand alone against scores of the most powerful men in the land, who made them and own them, and they cringe at the crack of the party whip. They are vacillating because, having been in league with these same persons during the canvass and engaged in intrigues to effect their election, they are bound by the festering fetters of guilt, whilst at the same time they are uplifted in the sight of the world with the organic law of the land to execute, their name and their fame at stake, and their master, the Constitution, at odds with their masters, the party chiefs. They buy political influence with the people, by whom they are unlawfully elected, by promising emoluments to their leaders, and they sell their own influence in local elections and "log-rolling" schemes, because only thus can they enter the office. They remove worthy officials without cause and bestow commissions on incompetents, because they must gratify these leaders by the appointment of their worthless adherents. The highest offices under the government are given to the politicians in chief, who contrived their nomination and won their election, and if they dare purge the service and execute their duty by nominating men of national worth to important positions, they find themselves caught in the wheels of "the machine," whence they must escape by retreat, or be ground to powder. Let them have never so high an aim, and let their measures conform to the popular wish; nevertheless, when their masters oppose, the people scoff and withhold a support, for they know that the office was obtained by intrigue, and they sympathize with the leaders whose interests their slave has betrayed.

It is an extraordinary and a lamentable state of affairs, when national politics are so demoralized that the people contemn their own Presi-

dent, deride his proffered reforms, scoff at his protestations of integrity, and laugh at the impotent struggles of a self-immolated victim. A strong, bold, self-respecting Executive might burst these bonds for the nonce, but such a man is not likely to reach the office through the political slough that leads thither. The person who attains it must be tainted, guilty, and weak, and the stronger men, who supported his steps, will incontinently gather his patronage. He has sacrificed his integrity, lost his independence, and he must truckle, crawl and obey.

Such is the representative head of the United States under our modern system of electing him, and he is a disgrace to the fearless, independent, unflinching American people. It is reiterated with emphasis that such a President could never be the product of the constitutional Electoral System.

Having reached the conclusion that our corrupt civil service has its origin in the conversion of our Presidents into the tools of their party chiefs, it is in order to ascertain the causes of this abnormal transformation. The road to be pursued in examining them is broad and easily followed, and it is lined with the milestones of illegal customs established by the political parties of the country, which vanish in the distance as we look down the vista to its beginning in 1789.

At that date and in the election of George Washington the Electoral System was executed to the letter, and in instituting our civil service the President was a free man, obeying the Constitution and acting for the national welfare. Succeeding campaigns were conducted on the same basis, until in 1801, at the contest between the Federalists and Republicans in the House election, the System was violated by extending the transaction over a week, instead of electing "immediately." History shows that for the first time charges of corruption in the civil service were seriously made, and boldly asserted at a subsequent session of Congress by James A. Bayard, who recited names and facts, and affirmed that offices were given by Jefferson to members of the opposition as rewards for their influence and support. Still, the corruption was confined to occasional lapses of Presidential rectitude, the Electoral System was otherwise honestly executed, and the civil service was pure in the main, and remained so until 1824. At that date the election again fell on the House, and, though it was completed in the lawful period, it was unlawful in choosing a man whom the

majority of the Electors repudiated. Congress executed the letter of the law by electing by their own majority, but violated its spirit by choosing in opposition to the popular and electoral wish ; for the President whom the Constitution contemplates is the representative man of the people, and Congress are morally bound to respect the higher law of the land when the right to a choice devolves on them. Immediately charges of intrigue and corruption were made, and as a conspicuous instance, Henry Clay carried the taint to his grave. Nevertheless, during these forty years the general civil service was settled, efficient, and pure, conducted on a legitimate basis, and creditable to the nation and its administrations.*

In 1828 Andrew Jackson was elected to the Presidency, and his inauguration was salvoed by the cry of a barbarian, "To the victors belong the spoils!" About this time national parties had their birth, of which the avaricious, powerful, unprincipled organizations extant to-day are the robust development, and they came into being with claws and fangs fully matured, the wild beasts of politics which they have shown themselves to be. Since that date the American Civil Service has been a reproach and a shame, until even its ravaging chiefs are gorged to satiety, and themselves the defenceless prey of a horde of insatiable parasites.

PRESIDENTIAL NOMINATIONS.

The parties of the country are composed of its people, but their organized heads are their political leaders, the politicians, tricksters, and demagogues, who constitute what is known as "the machine,"—that barbaric Juggernaut, to which Executive independence is sacrificed. Nevertheless, since they are sustained by their followers, they may be said to represent the people, and their acts and demands are therefore the acts and demands of the people. "The machine" thus becomes a most formidable engine in the political campaign, by it the Presidential candidates are defeated, and to it they owe, not only their nomination, but their immediate election. For, as heretofore observed, the election in vogue is a popular one, the victorious party is a popu-

* It is currently reported that Washington dismissed nine civil officers in eight years, John Adams ten in four years, Jefferson forty-two in eight years, Madison five in eight years, Monroe nine in eight years, and John Quincy Adams two in four years.

lar one, "the machine" represents the party, and a choice by the people is therefore a choice by "the machine." Assured of their power, the leaders of the dominant party concede a nomination only at the expense of a subsequent subserviency; the candidate aims at the honors of the office, they seek only its "spoils," and the bargain is speedily struck.

In the modern campaign a political party is a mob, whose rank and file enter the contest, not for the honor and welfare of the nation, but for the sake of prospective booty. They practically vote for the President, and they know it; therefore, after his election is won, they demand their reward, their leaders recognize the necessity of compliance in order to keep the party in hand, and the President acquiesces in their demands. Should he resist, he is whipped into submission, or formally read out of the party and henceforth disgraced. And the only cause of his slavery is the fact that this mob are the direct means of his election, whilst its legitimate and inevitable end is the ruination of the civil service.

It is manifest therefore that the only adequate method of reforming that service is to restore the pristine independence of the Executive, which must be done by purifying "the process of his election." That election is now a popular transaction, in flagrant violation of the Constitution, and it must be made to conform to the original Electoral System. Its popular form is occasioned by the fact that the Presidential nominees are appointed *prior* to the election of Electors, whereby, though the people ostensibly vote for the latter, they really vote for the former. Consequently the axe must be laid to the root of the evil, and the existing custom abolished.

The only authority, under the spirit of the System, which can be exercised for this purpose, is the prevention of the influence of national parties in the *immediate* choice of the President, which they obtain by force of these premature nominations. Therefore Sec. III. of the proposed amendment extends no farther than a specification of the lawful time of nomination, and prescribes that it shall be made *after* the choice or election of Electors.

It has already been shown that the customs in vogue are not only an actual contravention of the spirit of the Electoral System, but that they violate its specific provisions.* These provisions embody funda-

* *Vide* pages 111, 112, 113 and 118.

mental principles, and, whilst they remain in the organic law, it is the duty of people, parties, and Government to respect and enforce them. Since in these particulars the Constitution has been misconstrued and disobeyed heretofore, is disobeyed and misconstrued now, and is likely to be so hereafter, it were wise to redefine them in terms beyond any dispute, and to enunciate a rule by which they may be practically executed.

It is a remarkable fact that, though political parties are the most powerful, active, and aggressive agents in electing our Presidents, they are entirely unrecognized by either the Constitution or laws. Their liberty therefore degenerates into license, and they necessarily become a horde of barbarians. The Electoral System did not deal with them, because it eschewed them, and, prescribing an independent choice of the President by Electors, it confined their evil influences to the election of these latter in the States, and under State laws. In enforcing the System to-day, we are in duty bound to recognize their existence and to devise legislation for their control, and, since they have forcibly invaded the citadel of the System, they require a forcible expulsion.

The election of a President is a political transaction, and there is no good reason why political parties should not engage in it; but there is most excellent reason why, in so engaging, they should be peremptorily limited to the observance of the fundamental law. Their members are citizens of the country, and owe their primary allegiance to it; when they divert it to their own selfish purposes, they damage the land that endures them. Under existing customs, their influence is malign; under a restored Electoral System, it might be and would be beneficent, a healthful and vitalizing power in the nation. Recognizing them as necessary factors in an election, as subject to law and as possible benefactors thereunder, they are only required to make their customs conform to the spirit of the Constitution.

Under such an amendment, they would stand on the same ground that they occupy to-day; dividing upon national issues, they would nominate their respective candidates accordingly, and, then as now, one of their nominees would be the succeeding President. But their campaigns would be carried on in the States for the choice of Electors, who, representing their parties and being chosen by them, would be pledged to execute their behests, but would not be pledged to a can-

dicate. The result would be that, while the President would be indebted to a national party for his nomination, they would not be his immediate electors, and the Constitution would so far be executed exactly. The campaign would be prosecuted in thirty-eight States, its issue would be the election of Electors and not of a President, and again the law would be fulfilled. Political parties would be the supporters of political measures, as they should be, and not of plotting, unscrupulous men; their battles would be fought in defence of principles, and, their victories being won before the question of nominations arose, these latter would be uncontaminated by the vices at present infecting them.

The Electors being already chosen, the National Convention would be executing its legitimate function of placing the fittest man in the nation before them, and it would inevitably follow that, instead of selecting a candidate because of his money or his political influence, his capacity for intrigue and his familiarity with "wire pulling," it would nominate the representative man in the party, for the credit of the party and for the good of the country. The State elections would be purified, the choice of the Electors would be purified, and the election of a President would be purified and ennobled. Henceforth we should have no more pettifogging politicians lifted to that eminent station, and exercising their small arts and pitiful ambitions to the scandal of the country. The future Presidents would be, as were the earlier incumbents of the office, the ablest statesmen, the truest patriots in the nation, fit representatives of a great people, and of brain and nerve sufficient to conduct the United States to pre-eminence among the nations of the world.

And above all they would be free and independent Presidents, indebted to the people at large for their election and bound to conduct the civil service for the benefit of the nation. These are the Executives for whom the Electoral System provided, these are the nominations and elections which the Constitution contemplates, and these are a few of the gracious results which will issue from the foregoing proposed amendment.

A pure President may possibly be seated by impure means, but the chances are largely against it; should he attempt a reform, it would be nipped in the bud, or at best be spasmodic, and his successor would revert to the barbaric custom of distributing the "spoils" of the

party. Purify "the process of election," so that the candidate may enter the office a free man, and a pure administration is almost guaranteed to ensue. This is the first step towards a healthful administration of the civil service, and the country must take it, or it will never reach the reform.

ELECTIONS AND ELECTORS.

One of the grandest injuries that existing customs inflict is the conversion of the States into arenas for fighting national political battles, and that the proposed amendment will largely prevent. Unquestionably the Constitution contemplates the election of a President by the States, and not by the masses, and therefore this amendment is a reaffirmation of the law as to this particular also.

In addition to the foregoing, they drag the whole people into the turmoil, excitement, excess and passion of a contest for the election of one man to an office;—a result which is in most flagrant violation of both the letter and spirit of the Constitution, and which is deprecated by every fair-minded man in the land. A long line of evils follow in the wake of this custom, too long to recapitulate here; but they pursue it with the persistency of sharks, and swallow up one after another the dead bodies of our laws and institutions.

There is no valid reason producible for the perpetuation of these illegal customs. When the efforts of two political parties are subjected to law, and when neither of them has license to violate that law, they are just as sure of accomplishing their ends as if they are both untrammelled. If, for example, the Republican and Democratic parties of New York had inaugurated a campaign in 1876 solely for the election of Electors, the result would have been exactly the same that transpired; and then, when the national conventions had nominated their candidates subsequently, the victorious party would have had just as good a chance to elect him. How almost infinitely a better one in fact! For then Louisiana and Florida and South Carolina would have actually chosen their Electors, and no soldiery would have been stationed at their ballot boxes to interfere with the exercise of their constitutional right of determining their private affairs for themselves.

The evils resulting from this use of the States as national campaigning grounds are enormous, and they inflict a blighting damage on both general and local prosperity. There is no apology for the

custom, except this;—that it fosters and fattens a clique of national politicians, who live at the expense of the country's peace, and whose fingers are dipped into the private affairs of every State in the Union. But is that a good reason why the people should sustain them? Verily, the citizens of the States are the most unmitigated fools recorded in history, if they will consent, especially after their recent experience, to uphold a system which accomplishes no earthly good, and which makes them the slaves of a clique of merciless taskmasters.

It is reaffirmed then, that while the amendment suggested will remove a tremendous burden of political oppression which the States are now stupidly shouldering, it also will not interfere with the legitimate aims of the national parties. It will not require more insight than that of the average politician to see this fact, if he looks at it closely; whilst the statesmen of the country must at once perceive the transcendent advantages which will flow from this separation of State and National politics. Both parties have solemnly committed themselves to reform, and this, the purification of the Presidential election, is the prime requisite on which it depends. Congress have an admirable opportunity now, both factions being agreed, to make good their pledges to the people.

Concurrent with the former provision, and with a view to a like beneficial result, Sec. III. lays on the States an injunction against the present pernicious practice of electing national and local officers on the same day. The Constitution requires the separation of these two classes of politics, and their union therefore is in direct contravention of law. And there is no fact recorded in the annals of both the States and the nation, which experience has made plainer, than that of the injury to both by this violation of the natural, fundamental law of our dual form of State and National government. Unequally yoked together, the interests of neither party are conserved, and the stronger is sure to oppress the weaker.

When South Carolina recently, by the exercise of an unexpected quantum of good sense, wrenched apart these conflicting interests and elected a home candidate on home issues, and a national candidate on national issues, she set the rest of the States an eminently worthy example. But which other of them did the same? The chief reason why they do not follow her is that, when they mingle the ballots together at the polls, they mingle the issues as well.

This custom stands in the same category as the foregoing, in that there is no good reason for it, and in that it perverts both the National and State elections to the selfish support of cliques. Intelligent and practical men look on and bewail the resulting corruption, and they fold their hands in despair and think it inevitable; but it is not, if they declare that it shall stop. So they might stupidly stare at a usurpation of the general of our armies; but would they do so? The latter would be a no more flagrant violation of the law than the former is of both its spirit and letter. Our proposed reform takes higher ground than even the solid formulary, *malus usus abolendus est*; for this is not a custom unlegislated upon, or sanctioned by law, but it is in direct violation of law, and we proceed on the principle that the Constitution must be executed by the State, the people, the politicians, the Congress, and the officers of the nation.

Sec. IV. of the proposed amendment concerns itself with a much needed reform in Executive representation. The object is legitimate, and the means suggested so simple and rational that they do not require an extended discussion.

Our present system, by making the Electors equal in number to both the Senators and Representatives, destroys a fair representation of the people. It is reasonable enough to select two persons from the State at large for the Congress, where the Houses act separately, in order that the representatives of the States and the people may check each other; but it is manifestly impolitic in the case of the Electors, who act together, and whose total vote is to be counted, and it often results in seating a President who is the choice of a popular minority. This is not consistent with republican institutions.

Doubtless a sop thrown to the Cerberus of State Rights by the Fathers, it does not embody a principle of the Electoral System, but is in fact opposed to the prevailing spirit of the scheme, which contemplates an election of President by the States, not checked by, but in accord with, the wishes of a majority of the people. Having effected its original purpose of a compromise, and being now the conservator of injustice under our re-nationalized Union, it should be expunged from the Constitution. The limitation of the number of Electors to an equality with that of the Representatives effects this end exactly, and respects the rights of both the States and the people.

Another concession by the Fathers to State rights was the investiture of the States with an absolute control over the manner of choosing Electors. The theory was that this people, who had suffered so much in defence of their right of representation, would jealously guard it forever in its purest and most perfect form. But the inevitable result speedily declared itself in our early political practices, when the several Legislatures began to wield the power arbitrarily, frequently in defiance of their constituents, from purely partisan motives, and too often under still baser influences. In the second decade the better plan was instituted of a choice of Electors by the people of the Congressional Districts; and when finally national parties assumed the management of elections, one of their innovations was the introduction of a State electoral ticket, voted for by the people, but representing the State majorities. This is the existing method pursued, and it requires no extended argument to prove that it practically subverts the spirit of the genuine Electoral System. That System clearly contemplates a choice by districts as well as by States, by the very terms of its provision proportioning the number of Electors to the Representatives and Senators; and it is but proper that its perverted intention should now be categorically defined by an amendment.

In advocating the reform the statesmen of this generation will be following the lead of the ablest statesmen and sages of our early history, who advocated it in the Convention of 1787, and time and again in the halls of Congress. Jefferson was a prominent believer in it; it was advised by the aged Madison, and it has been frequently offered in Congress as a needed amendment. At the outset its judicious policy was sacrificed to State rights, and subsequently it was opposed by political parties; but to-day neither of those illegitimate influences should be allowed by the people to stand in the way of their manifest interest in a just and adequate representation.

THE SECONDARY ELECTION.

Sec. V. is proposed as necessary because of our long-continued misinterpretation of the constitutional method of receiving, opening, and counting the votes, and it is a redefinition of the original System. Having been discussed and demonstrated heretofore, the subject requires no further elucidation.

Sections VI., VII., and VIII. concern themselves with the time of transacting a Presidential election by the Houses, when the Electors have failed of a choice.

It was undeniably the purpose of the System to demand of Congress an *immediate* election of President and Vice President when the choice devolved on them, as has been fully shown heretofore,* but the election of Jefferson in 1801 introduced the noxious and unconstitutional custom of contesting it for an indefinite period. Such a practice destroys one of the most important principles in the Electoral System, and it results in making an election, in that one case, an unmixed evil, instead of the proximate perfection designed. In such a case as that of Jefferson and Burr, it is obvious that a compromise must be made, and it is a matter of no moment to the political parties whether it occur in twenty-four hours or in twenty-four weeks. But it is of vast moment to the purity of the election, and of transcendent importance to the peace of the nation, that a choice be effected at once. The exigency is not likely to occur in an age, but it should be anticipated now while amendments are in order. There is no fair reason producible why the alteration should not be made.

The XII. Amendment, by one of its clauses, makes the eighth provision necessary, as supplementary to the sixth and seventh. The language of that amendment is self-contradictory, but the purport of the latter clause is distinct, and requires a specific repeal.

In a letter to George McDuffie of January 3, 1824, commenting on an amendment to the Constitution, which was then under consideration, and which was designed in part to repeal the following vicious clause of the XII. Amendment,—“If the House of Representatives shall not choose a President before the fourth day of March next following, then the Vice President shall act as President,”—James Madison notes the weak effort made to effect the repeal, and the necessity of using emphatic terms; which however, we have already discovered, the House is only too prone to pervert, and which therefore needs a new and unquestionable definition. He writes as follows concerning it:

“Would it not be better to retain the word ‘immediately,’ in requiring the two Houses to proceed to the choice of President and Vice President, than to change it into ‘without separating?’ If the change

* *Vide* pages 115, 208, 210 and 234.

would quicken and insure a final ballot, it would certainly be a good one."

In this connection the fact may be noted that one of the strongest arguments advanced in support of a change in our Electoral System is that at this secondary election the President is chosen by "a moribund House," that is, by Representatives who themselves are elected on other issues than those which dominate the current campaign. But it is obvious that this is not a defect of the System, and that it occurs only for want of Congressional action on the matter. Since Representatives are to be elected every two years, a statute may, and ought, to provide for the assemblage of those last elected on the first Monday in December of the year in which they are chosen, and of every electoral year.

AN EXECUTED SYSTEM.

In conclusion of our inquiry into the Electoral System, it is perhaps advisable to epitomize the principles found to be involved in it, and to deduce from them a practical remedy for the numerous evils attending our Presidential elections, which may be enforced without reference to the foregoing amendment. This may be most suitably done by framing them into an Electoral Act, whose provisions will execute both the spirit and letter of the Constitution; for this end indeed the System was framed,—that Congress should enact a comprehensive law executory of it.

Our investigation has shown that the two Acts now in existence, those of 1792 and 1845, are defective because of their equivocal and indefinite dictio[n] in some cases, and because of the confusion of terms in the latter; whilst most of the provisions of the former are antiquated, and some of them weighed and found wanting by experience.* Furthermore, a variety of questions have arisen under them both, which were either not contemplated by their framers, or which the laws themselves are not sufficiently definite to determine. And finally, since the birth of this nation, it has developed a robust habit of political life, whose customs are strongly fixed, and which must be dealt with specifically under the Constitution. How and why these abnormal growths have sprung from the original customs of the Fathers, has

* *Vide* pages 251, 254 and 258.

already been pointed out. The fact is assumed, that the sovereign people of this nation, guided by the wisdom and sagacity of its statesmen, have the strength, the intelligence, the virtue and the will to excise these parasitic fungi, which only degrade and repress the normal development of the System.

The question recurs then, What shall be done that these dangers and difficulties may be averted? And the categorical answer is, Execute the Constitution of the United States! In that reply lies a panacea for all the ills which have arisen, or which are likely to arise, under the Electoral System. The scheme is a perfect one, with the exception of the secondary election by Congress, which latter can be rendered almost innocuous by restoring it to the purity sacrificed by the XII. Amendment.

Our Electoral System has been called "a sham," but it is only so when it is falsified in practice; the very designation of it as a counterfeit points to the existence of a genuine System, misinterpreted, misapplied and misused. It is a System which was approved by Washington, the purest patriot of eminence whom the world has produced; which was framed by Madison, King, Sherman, Morris and Baldwin, men famed for their eminent intelligence and sagacity; which was indorsed by McKean and Hamilton, statesmen *par excellence*, as "almost perfection"; and which was subscribed to by Benjamin Franklin, the incarnation of wisdom and practical common sense. And yet it has, in these degenerate days, been stigmatized as "utopian!"

What the country requires is, not a new system, but a new law; not new theories and plans, but a practical execution of the originals; not an autocratic tribunal to settle disputes, but an efficient mode of judicial procedure; not the *ipse dixit* of the factions in the Houses, but the dignified arbitrament of an Act of Congress. Peace, order and law should reign and rule in this land, and the nation owes it as a duty to itself to demand a recognition of this fact from its Representatives. Time and again in the halls of Congress prophecies have been made of impending danger from a mal-administration of the System, which read like histories in the light of the facts of to-day; and if we neglect the lessons of these prophecies and facts, future generations may yet revert with amazement to the fatuity of a nation, which shamefully sacrificed its birth-right.

In framing the following law, the broad and solid foundation of the

Constitution has been selected to build it upon. The fundamental rule of architecture employed, is that the Electoral System was instituted in order that its spirit and letter might be executed. The surroundings of customs, parties and politics have been duly considered in proportioning it, and the line and plummet of justice and order have been laid to its various provisions. The principles cementing it together have been heretofore elaborately discussed and determined, and the end and aim of its construction is to vindicate the harmony and perfection of the plan conceived by our patriot forefathers.

A CODIFIED SYSTEM.

The proposed law recognizes five parties as engaged in the transaction of an election, distinct and independent in their several spheres, and yet indissolubly bound together by the established principle of this government,—representation. Failures and frauds are assumed as the natural products of perverted humanity, and are provided against, or their evil results are forefended.

1. The *status* of the States in a Presidential election is fixed, so as to forbid a determination of it from partisan motives, as has unhappily been done in the past. Their sovereignty is recognized in their local realm of appointing Electors under the Constitution, whose right is not to be questioned, except by their own citizens, or on their own motion. A certification under seal of the State is made the reasonable *prima facie* evidence of the appointment; subject, secondarily, to a contest by the citizens of the State and the judgment of their own courts, which is made a superior evidence of appointment; and finally subject to the decision of the Supreme Court of the United States, whose judgment is the conclusive evidence of the appointment. The first provision is specific and perspicuous, and will determine all State appointments except in extraordinary cases of error or fraud, when there obviously should be a revision. In these rare cases, the second provision will determine the contest conclusively; for, though another tribunal is provided as a *dernier resort*, it is highly improbable that it would ever be used.

To a student of the Constitution it must seem eminently proper that the States manage and dispose of their local affairs, among which is incontestably that of appointing Electors; only when their internal disputes are likely to jeopardize the welfare of the nation, is it fit that

the national Government should decide them, and in that event they are committed to its judicial branch. Such a disposition of these contests must terminate the production of dual returns, based, as they always have been, on an expected political arbitrament by Congress.

2. The Electors are recognized as the independent representatives of the States appointed to choose a President for the nation, and who, as the then active officers of the nation, are subject to direction by the national laws as to the manner in which they shall perform their duties. To prevent contests among themselves, such as occurred in Oregon recently, they are prohibited from deciding disputed questions of law, which are to be otherwise disposed of. To prevent frauds against their States, they are prohibited from choosing substitutes for the absentees; by the custom obtaining the door is thrown open too widely to frauds, and it ought to be shut. To prevent combinations among them, they are prohibited from pledging themselves to a candidate for election. This is perhaps the widest departure from existing customs, but it is one made necessary by the imperative command of the Constitution; the spirit of the electoral provision, which segregates them into their respective States and prescribes a secret expression of their will by the ballot, demands that respect be paid to it by the forms of the national law at least.

If the people are careless about this breach of the law, it is because their leaders neglect their duty; and it is not too extravagant to assert that every intelligent mind, excepting those of the demagogues and politicians who live by their trade, will welcome a change of the kind proposed; certainly all respectable and law-abiding citizens will indorse it. It is this custom of pledging Electors, which subjects the Electoral System to the reproach of being "a sham"; whereas it is not the System, but it is our execution of it, which is the sham,—the false, insidious, counterfeit execution of the letter of the law, with the emasculation of the virtue and vigor of its spirit. Let the political parties nominate their Electors and elect them as they please; but so long as Electors are officers of the United States and the interests of the nation are at stake in their hands, let them be required to fulfil the spirit, as well as the letter, of the Constitution which has created them.

3. The two Houses of Congress are recognized as sovereign supervisors of the legislation, which shall direct the transaction of a Presi-

dential election in its minutest particulars. Exercising their high privileges and duties thus under the Constitution, they render to the nation the best and most patriotic service in their power,—they give it a wise and comprehensive law. Thereby the doubts and distractions of the past will be obviated in the future, and they will behold the provisions of that Constitution, which they are sworn to execute, harmoniously working in the advancement of the interests of the State.

To whom shall we look, if not to Congress, for the means of extricating ourselves from the political sloughs into which of late we have fallen? Common sense, if not their recent bitter experiences, should teach them to provide for the choice of the Executive of this nation,—the commander-in-chief of an army which may be used to oppress, as well as to defend,—by a law, that will lift it out of its present contemptible condition of one of the party “spoils.” To fetter his hands by curtailing the army is mayhap to confound the nation in case of a sudden international emergency, and it is the resort of a weakling, who deems its commander a tyrant or fool. A broad and enlightened statesmanship requires that legislation be directed towards the means of obtaining the election of a President, who, when he draws his sword, will wield it against the foes of his country, but never against her prevalent interests.

But Congress must have learned a lesson from the events of the year just past, and it is to be hoped they will profit by it. When the “solid South” unites with the “solid North,” in demanding that hereafter the Houses perform their legitimate functions of making the laws of the land, and of witnessing the execution of one of them at the Opening of the Votes, the country will have taken a long and satisfactory stride towards future exemption from the imposition of a fraudulently-elected President.

4. The President of the Senate is recognized as the independent agent of the nation, appointed by the Constitution, to receive, open, and count the votes of the Electors. He is divested however of all power of arbitrary decision, and must exercise his liberty under the law; his business is, as it was designed to be in all cases, the ministerial execution of the rules provided for him, doubtful matters being relegated to the judgment of the courts.

Both he and the Electors, having high official functions to perform,

are made subject to pains and penalties in case of a fraudulent execution of them; since the temptation is great, the opportunity frequent, and the result so disastrous to the nation, they should be held to the strictest performance of duty, and punished severely when they evade it. Errors might possibly occur, and therefore they are provided for. It does not seem possible that a better plan of ascertaining the honest result of an election could be devised, than that provided by the wisdom of the Fathers,—the appointment of an exalted, independent, and responsible ministerial agent, who must disclose the votes of the Electors according to the standard of the law.

5. The President of the United States is recognized as the independent Executive of the laws, and not as the man "with a chain on his pen" whom Pinckney predicted as the product of intrigue and corruption; free to employ the army for the good of the people, but not compelled by the men who inducted him into office to use it for the oppression of any part of them; at liberty to appoint a host of office-holders to positions of trust and profit, but not forced to their gift as rewards to adherents who have betrayed the interests of the nation. Regarding him from this point of view, which is also the standpoint of the Constitution, it is obvious that his election must be kept as far as possible from a dependence on demagoguery, trickery and fraud; the spirit of all the provisions of the Constitution relating to his office, point to his entire independence of these debasing influences of party politics, and our law supplements it as far as is possible under the circumstances.

With or without an amendment, Congress are empowered to enforce the Electoral System, and as political parties have entrenched on its provisions, it is their duty to repress the unlawful customs obtaining. The method of accomplishing this reform, by the prohibition of national nominations for President until after the election of Electors, has been already adequately discussed.

There are certain other changes in the terms of the existing Acts wrought into the following law, which are commended to the practical wisdom of statesmen and to the thoughtful consideration of the people. They may however only be glanced at here.

Since the intent of the Constitution is to make a Presidential election swift and certain, the provisions of the proposed law regulate the various stages of its progress according to the facilities of this age of

railways and telegraphs; everything is consummated between the first of November and the twenty-first of December, except in the one improbable event of a contested election, and the time accorded is ample to provide for all exigencies.* The *status* of persons ineligible to appointment as Electors is clearly defined, as it should be, and disputation barred in the future at the Opening of the Votes. Electors are made more independent by forbidding their nomination to national offices as a reward from the President they elect for a bargain and sale of their votes, so that the purity of the election may be more fully assured. The legal vote of an Elector is exactly defined, so that hereafter there need be no controversy in Congress or elsewhere as to what it consists in, nor any possibility of mistaking it. Certain apparently indispensable provisions are made for the government of Congress at the meeting of the Houses, so that there may no longer be disgraceful dispute or disagreement as to their privileges and duties, and, knowing them exactly, they will unquestionably perform them. The President of the Senate is required to exercise such official cognizance of the transactions of an election, that the proper electoral representation of the States may be more fully assured, and that the execution of his own duties is rendered easy and satisfactory to all parties. The States are required to enact laws governing the appointment of Electors according to the Constitution, and to certify that they have been so appointed.

Other provisions follow the general tenor of the law of 1792, except in the following two instances.

VACANCIES AND TERMS.

In order to separate the Presidency more effectually from all complications with political factions, "the Secretary of State" is made the successor to a vacant office, after the Vice President. Under the Act of 1792, the President of the Senate *pro tempore*, or the Speaker of the House, succeeds to the office; but this would seem to be in conflict with the Constitution.

It is scarcely reasonable to hold that the "Officer," who, Congress is empowered to declare, shall "act as President," was intended to be a mere temporary and parliamentary officer of one of the Houses.

* *Vide* page 254.

The induction of such a successor would violate the spirit of the System, which is designed to free the office from all connection with the Legislature, except in one exigent case; this is not a case of the kind, for it is to be provided for by a deliberated statute.

In the Convention of 1787 the creation of a Cabinet or Council for the President was under consideration, and wisely relegated to the necessities of the future; but one of the objects in proposing its establishment was to provide the President's successor in certain cases, and the Secretary of State was the officer who would have then been chosen. When the Act of 1792 was framing, James Madison, and perhaps other members of the Convention, advocated the selection of the Secretary of State; but they were overruled by others, who based their argument on the fact that the Constitution authorizes the Houses to choose their "officers." This is true; but it will appear from an examination of the Constitution that these "officers" were merely parliamentary officers, chosen for the sake of expediency, and not the "civil, the executive and judicial officers," or "the officers of the United States," whom the Constitution clearly refers to, and who, as part of the administration, might fitly succeed the President.

From a comparison of the following selections from the Constitution it is obvious that, 1st, "civil officers," include the executive and judicial officers; 2d, that three kinds of offices connected with the Government of the United States are recognized,—offices of "honor, trust and profit"; 3d, that the President is not regarded as "an officer of, or under, the United States," but as one branch of "the Government"; 4th, that the Vice President holds an office of "profit and honor,"—as the agent to open and count the votes of the Electors, an office of "trust,"—and, as the President of the Senate, a parliamentary office only; 5th, that Senators, Representatives, or "members" of the Houses, are never referred to as "officers of the United States," and are always carefully distinguished from the latter, and are regarded as constituting the Government in part; 6th, that the President of the Senate *pro tempore*, being a member of the Senate, cannot hold an office of "trust and profit," and is a mere presiding officer in the stead of the President of the Senate; 7th, that he executes the "trust" of counting the votes *ex officio*; 8th, that "civil officers" are distinguished from the President and Vice President in cases of impeachment; 9th, that "civil officers" must be removed from office by

impeachment, whilst Congress may punish and expel their own officers and members ; 10th, that Electors hold offices of " trust" ; 11th, that the Secretary of State is an " officer of the United States" ; and, 12th, that all the " officers of the United States" *must be commissioned by the President*. It seems clear then that all these deductions point to the fact, that the President of the Senate *pro tempore* and the Speaker of the House are not the " officers" whom the Constitution had in view, when referring to the Presidential succession, and that the Secretary of State is included among them.

" The Vice President of the United States shall be President of the Senate.

" The Senate shall choose their other officers, and a President of the Senate *pro tempore*. The House shall choose their Speaker and other officers. Each House may determine the rules of its proceedings, and shall keep a journal of its proceedings.

" Before he (the President) shall enter on the execution of his office, he shall take the following oath or affirmation. The Senators and Representatives, and all executive and all judicial officers of the United States shall be bound by oath or affirmation.

" Judgment in cases of impeachment shall extend to disqualification to hold and enjoy any office of honor, trust or profit under the United States. The President, Vice President, and all civil officers of the United States shall be removed from office on impeachment, etc. Each House may punish its members, and, with the concurrence of two-thirds, expel a member.

" No person holding any civil office under the United States shall be a member of either House. No Senator or Representative shall be appointed to any civil office under the authority of the United States. No Senator, or Representative, or person holding an office of trust or profit under the United States, shall be appointed an Elector.

" The Congress shall have power to make all laws necessary and proper for carrying into execution the powers vested in the Government of the United States, or in any department or officer thereof. [The Houses make 'rules' for the guidance of their presiding officer.]

" The President shall have power to appoint Judges of the Supreme Court, etc., and all other officers of the United States; and shall commission all the officers of the United States.

"Congress may by law provide for the death, etc., of both the President and Vice President, declaring what officer shall then act as President."

One difficulty in the way of the succession of the President of the Senate *pro tempore*, or of the Speaker of the House, seems to have altogether escaped the notice of the framers of the law of 1792, and yet it may occur every second year. Should the aforesaid vacancy occur after the expiration of one Congress and before the meeting of the next, there would be neither a President of the Senate *pro tem.*, nor a Speaker of the House, *in esse*, and therefore no one to "act as President." This defect is a radical one in any law that may be made, empowering either of these parliamentary officers to act, and cannot possibly be overcome.

But again, in the event of a vacancy, as a rule, deduced from the records of history, the Secretary of State would be the President's most suitable successor, not only because he is that member of the Cabinet most independent of party complications, but because of his usually broad and comprehensive intellect, and because of his familiarity with the policy of the administration. Furthermore, it might well happen in the event of a vacancy that the President of the Senate *pro tempore* would be a member of a different political party, and his incumbency, perhaps at the middle of a term, would likely unsettle the whole government, which is unstable enough now and so frequently changed that it is unwise to subject it to other disadvantages of the same kind. And finally, the contingency of the succession of a President of the Senate *pro tempore*, or of a Speaker of the House, is so remote that it is not worth while for politicians to provide for the division of such a "spoil"; whilst the advantage to the nation of the succession of the Secretary of State is so great in the event of its happening, that it is reason enough for our statesmen to insure it by a change in the present law.

Complementary to the foregoing provision is another, which makes the Presidential terms follow in regular succession, without the intervention of sporadic elections, which can accomplish no good, and must always result in harm to the interests of the people. The Act of 1792 prescribes an intercalary election in the event of a successor being called to act as President, as heretofore adverted to.* But it is

* *Vide page 206.*

very clear that there is neither an express nor an implied power in the Constitution, authorizing Congress to provide for such an election. By the clear direction of that instrument, "Congress may by law provide for the case of removal, death, resignation, or inability both of the President and Vice President, declaring what officer shall then act as President," and there their authority ceases; to overstep this limit is to usurp an authority, for the exercise of which there are not only no reasons of State, but no warrant of law. Our provision therefore follows the Constitution as it reads, and as it is interpreted by Judge Story, Sec. 1483, who decides that the right to exercise such a power by Congress can only legitimately accrue by amendment, which, however, he does not advise and which could accomplish no good.

"How far such an exercise of power is constitutional has never yet been solemnly presented for decision. The point was hinted at in some of the debates when the Constitution was adopted; and it was then thought to be susceptible of some doubt. Every sincere friend of the Constitution will feel desirous of upholding the power as far as he constitutionally may. But it would be more satisfactory to provide for the case by some suitable amendment, which should clear away every doubt, and thus prevent a crisis dangerous to our future peace, if not to the existence of the Government."

With these introductory remarks the proposed new law is submitted in detail, as an honest attempt to solve the political problem before the country, and as embodying the spirit as well as the letter of the Constitution. It may not be perfect, but it at least has the merit of aiming at perfection.

A NEW LAW.

SEC. I.—APPOINTMENT BY THE STATES.

1. For the purposes of this Act, a "State" shall be deemed to be one of the existing thirty-eight States of the Union, or any new State declared by concurrent resolution of the Houses to be a member of the Union prior to the choice of Electors as herein provided, which shall have a republican form of government framed under the Constitution and agreeably to the laws of the United States, and whose Government or a majority of whose citizens shall not be declared to be in rebellion or insurrection against the United States at the time herein prescribed for choosing Electors.

2. Each State shall be entitled, in the election of a President and Vice President of the United States, to a representation by the constitutional

number of Electors to which such State may be entitled, by law, on the day when the term of the Officers, thus to be elected, begins:

Provided that, when no new apportionment of Representatives has been made at the time of choosing Electors, the number shall then be proportioned to the existing apportionment.

3. Each State shall choose Electors of President and Vice President of the United States on the Tuesday next after the first Monday in November of the year preceding that in which the term of said Officers begins;

and no State shall, on the day for choosing said Electors, choose or elect any local or state officers whatever.

4. The chief executive officer of each State shall thereupon sign and transmit by post to the President of the Senate, at the seat of government of the United States, a list of the persons voted for or chosen as Electors as aforesaid;

and a list of the Electors appointed by each State shall in like manner be made and transmitted as soon as the appointment is made.

5. Each State shall appoint Electors of President and Vice President, agreeably to the Constitution of the United States, by or before noon of the first Wednesday in December of said year:

Provided that, no State shall appoint, as an Elector, a Senator, Representative, or person holding an office of trust or profit under the United States, or a person disqualified under the XIV. Amendment; and no such ineligible person shall be capable of such appointment, or of casting a legal vote.

6. The chief executive officer of each State, who is in office at the date of the appointment aforesaid, shall sign two certificates of the choice and appointment of said Electors agreeably to the Constitution and laws of the United States, and shall affix the great seal of the State thereto.

7. Said certificates shall be delivered to said Electors by or before one o'clock, P.M., on the first Wednesday in December aforesaid;

and said certificates so authenticated and delivered, or either of them, shall be the evidence to said Electors and to the President of the Senate of the appointment herein prescribed, except in the two cases hereinafter provided for.

SEC. II.—CANDIDATES AND OFFICIALS.

1. No nominations of candidates for the offices of President and Vice President of the United States for the ensuing term shall be made by any national or state political party, or by any nominating convention, prior to the second Tuesday after the said Electors have been chosen;

and the President shall enforce this provision by dispersing any convention assembled for the purpose of violating it.

2. No person appointed an Elector shall, during the ensuing Presiden-

tial term, be appointed to or hold any office of trust or profit in the gift of the United States.

3. An Elector who, either before or after his appointment, pledges himself to vote, or who accepts a bribe for voting, or refusing to vote, for a candidate for President or Vice President, and the person who offers or gives a bribe to an Elector, shall be deemed guilty of a crime against the United States, and shall, upon conviction thereof, be punished therefor by imprisonment for not less than five nor for more than fifteen years, and shall be forever disqualified for holding an office under the United States and for exercising the franchise of suffrage in a national election.

4. The messengers appointed by the Electors, or by the Supreme Court of a State, as herein provided, shall be allowed on the proper delivery of said certificates — cents per mile for every mile of estimated distance by the most direct route to the seat of government of the United States.

5. Any messenger appointed as aforesaid who, after accepting his appointment, neglects to perform the services required of him by this Act, shall, upon conviction thereof, forfeit the sum of \$5000, and shall be punished therefor by imprisonment for not less than one nor for more than five years.

SEC. III.—THE ELECTORAL COLLEGES.

1. The Legislature of each State may prescribe the place whereat the Electors of such State shall meet together and cast their votes.

2. The day, on which said Electors shall vote for President and Vice President, shall be the first Wednesday in December aforesaid, and their votes shall be illegal if cast on any other day:

Provided that, when the appointment or certification is contested as prescribed in Section six, clause four of this Act, the Electors certified to by said Court shall vote on the third Wednesday in December of the year aforesaid.

3. Said Electors shall meet together at one o'clock, P.M., exclusively by themselves in their respective States, and shall organize by electing, by a majority of those present, a chairman, who shall also be the secretary, and who shall perform the clerical duties of receiving the certificates of appointment, taking and counting the ballots, and preparing, sealing, indorsing, and transmitting the certified lists; and their business shall all be completed by six o'clock, P.M., on the same day.

4. In the event of an absence of one or more of said Electors from said meeting, those present only shall vote for President and Vice President;

when the Electors are met together as aforesaid, no alteration shall be made by the State in the certificates of appointment made and delivered to them;

and no failure of a State to choose or to appoint Electors, or of the ap-

pointed Electors to be present, shall be decreed or construed as empowering the said Electors to fill such vacancy.

5. Said Electors shall vote once only by ballot for President and Vice President of the United States, one of whom at least shall not be an inhabitant of the same State with themselves;

and they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President.

6. Said Electors shall thereupon make two distinct lists of all persons voted for as President and of all persons voted for as Vice President, with the names of the States whereof they are residents;

and they shall sign said lists and certify them to be according to the ballots cast as aforesaid, and on the day, at the time and place, and in the manner prescribed by law.

7. To each of said lists shall be attached the certificates of appointment aforesaid, and they shall then, in the presence of the said Electors, be sealed up, indorsed as the votes of the State for President and Vice President, and directed to the President of the Senate at the seat of government of the United States.

8. Said Electors shall also elect by a majority vote a messenger, whose election shall be certified to by the secretary aforesaid, and who shall thereupon take charge of and deliver one of said lists to the President of the Senate as directed, within thirteen days next following the day of meeting and voting aforesaid; and the other of said lists shall be transmitted by post as directed.

SEC. IV.—THE Two Houses.

1. Congress shall be in session at the seat of government of the United States on the third Wednesday in December next succeeding every meeting of the Electors;

and the two Houses shall meet together in the hall of the House of Representatives at one o'clock, P.M., on said day, for the purpose of witnessing the receiving, opening, and counting of the votes of the Electors by the President of the Senate:

Provided that, in the event of there being a contested appointment or certification of Electors as hereinafter provided for, all the proceedings shall be adjourned to the first Wednesday in January next succeeding, at one o'clock, P.M., when the two Houses shall again meet together as prescribed.

2. Congress shall provide the mode of witnessing aforesaid by a concurrent resolution, which shall appoint two tellers on the part of each House, who shall act as the agents of the Houses in examining the certificates and votes, and in verifying the statements of the President of the Senate, and who shall make and deliver to the clerks of their respective Houses a certificate of the votes counted for President and Vice Presi-

dent, and of the declaration of the persons elected, which shall thereupon be entered on the journals.

3. Congress shall also appoint by concurrent resolution a person or persons, who shall sit at the clerk's table and make an exact record of all the proceedings at the meeting or meetings of the Houses herein provided for, which record shall be examined and certified to by the tellers, and which shall be the official evidence of said proceedings, and shall be thereafter delivered to the clerk of the House of Representatives.

4. When met together as aforesaid, there shall be no recess, withdrawal or adjournment, other than that specified, of either House, and no debate or discussion among the members, and no business shall be transacted by either House other than that of witnessing, until the result of the votes is declared;

and the presiding officers of the two Houses shall maintain order during the proceedings, and enforce the observance of the provisions of this Act, relating to Congress, in their respective Houses.

5. During the meetings aforesaid, no objection to or interference with the execution of his duties by the President of the Senate shall be made; and all objections to or suggestions regarding the receiving, opening, and counting of the votes shall be made in writing, delivered to the tellers, and publicly read by one of them.

6. During the meetings aforesaid the public shall be admitted to view the proceedings, under regulations prescribed by concurrent resolution.

SEC. V.—THE PRESIDENT OF THE SENATE.

1. The Vice President of the United States shall execute all the duties required by this Act of the President of the Senate; but he may require the clerk of the Senate to execute, as his agent, any necessary clerical offices involved in them:

Provided that, in the event of the impeachment, removal, death, resignation, or disability of the Vice President, or when the office of President of the United States has devolved on him, the President of the Senate *pro tempore* shall execute said official duties, and shall enjoy the privileges and be subject to the pains and penalties attached thereto by this Act.

2. The President of the Senate shall be present at the seat of government of the United States on the day for choosing Electors aforesaid, and shall there remain until the votes of the Electors are counted and the result declared.

3. He shall take official and intelligent cognizance of the proceedings of the several States in choosing, appointing, and certifying Electors;

he shall, as soon as advised by general rumor, or by notice from the chief executive officers of the States as prescribed, ascertain the eligibility of the persons so voted for or chosen according to the terms of the Proviso attached to Section one, clause five of this Act;

and, if he find any of them to be ineligible as aforesaid, he shall thereupon certify the same to the chief executive officers of the States so choosing them.

4. He shall also take official and intelligent cognizance of the candidates for President and Vice President, and ascertain their eligibility under Article two, Section one, clause five, of the Constitution and under the XII. and XIV. Amendments;

and of the eligibility under this Act of the persons certified as Electors by the States, and of all other matters pertaining to his duty of receiving, opening, and counting the legal votes for President and Vice President of the United States.

5. He shall also take official cognizance of the mileage which may be due to the messengers, as herein provided, and shall certify to the same;

and he shall take official cognizance of the offences prescribed in Section two, clauses three and five, and in Section six, clause three, of this Act, and shall certify the same to the proper authorities.

6. He shall take charge of all the returns delivered to him by post and messenger, receipt for the same and retain them in his possession;

but he shall not receive them officially until the meeting of the Houses of Congress aforesaid.

7. He shall be present at the time and place herein prescribed for the meeting of the Houses, and shall occupy the chair of the Speaker of the House of Representatives;

in the event of the reception of the notification herein provided for of a contested certification or appointment of Electors, he shall officially notify the Houses of the fact, and adjourn all the proceedings to the first Wednesday in January next succeeding.

8. He shall render to the tellers every facility for examining and verifying the certificates or votes at any stage of the proceedings;

and he shall entertain and publicly determine all questions concerning and objections made to the receiving, opening, and counting of the votes, or pertaining to the proceedings in hand.

9. He shall, in the presence of the Senate and House of Representatives, produce all the returns delivered to him;

and he shall officially receive those which comply with Section one, clauses one and six, of this Act, rejecting those which do not comply therewith, and stating his reasons therefor, first unsealing and examining those not properly indorsed if necessary.

10. He shall thereafter, in the presence of the Senate and House of Representatives, open the certificates received and disclose the legal votes according to the letter of the rules provided in this Act;

and he shall officially declare the legal Electors and their legal votes in accordance therewith.

11. He shall thereafter, in the presence of the Senate and House of

Representatives, count and compute the said legal votes, and officially declare the result of the election.

12. He shall thereafter, in the presence of the Senate and House of Representatives, in the event that any person have a majority of the legal votes of the whole number of Electors legally appointed, officially proclaim, in accordance with the result declared, the President and Vice President of the United States for the ensuing term prescribed by the Constitution.

SEC. VI.—ERRORS AND FRAUDS.

1. At the conclusion of the proceedings in the presence of the Houses, all the returns, lists, certificates, and papers connected therewith shall be delivered by the President of the Senate to the Clerk of the House of Representatives, to be filed with the official record of the proceedings.

2. In the event of the discovery, at any time prior to the ensuing fourth day of March, of an error or fraud in the execution of his duties, which vitiates the result of the election as declared, the President of the Senate, or the President of the Senate *pro tempore*, shall notify the Houses, and they shall meet together immediately in the manner hereinbefore prescribed;

and the President of the Senate shall, in the presence of the Senate and House of Representatives, announce said error, declare the correct result, and officially proclaim the President and Vice President thus legally elected.

3. In the event of a fraudulent execution by the President of the Senate of his official duties herein prescribed, he shall be subject to impeachment at any time prior to the ensuing fourth day of March, and he shall be impeached agreeably to the Constitution;

on conviction thereof he shall also be indicted and tried, and, if found guilty, he shall be punished therefor by imprisonment for not less than fifteen nor for more than twenty-five years.

4. In the case of a fraudulent or erroneous appointment or certification of Electors by the chief executive officer of a State, the judgment of the Supreme Court of such State shall be held as establishing the State's Electors;

said Court shall cause a notice under seal of such pending trial and judgment to be transmitted to the seat of government of the United States by a messenger, who shall deliver the same to the President of the Senate by or before the meeting of the Houses on the third Wednesday in December hereinbefore prescribed;

said Court shall also, upon rendering said judgment, cause a certified copy of the same to be transmitted by post to the President of the Senate at the seat of government of the United States;

said judgment shall thereupon be certified in duplicate and under seal by said Court, and shall be delivered to said Electors by or before one o'clock, P.M., on the third Wednesday in December of the year aforesaid;

and said certificates so authenticated and delivered, or either of them,

shall be the evidence to said Electors and to the President of the Senate, when he opens them on the first Wednesday in January, of the choice and appointment of the State.

5. Upon the reception of the aforesaid notice of a contested appointment or certification of Electors in any of the States, the President of the Senate shall thereupon officially notify the Supreme Court of the United States, which shall convene at the seat of government on the third Wednesday in December aforesaid;

in case a State is dissatisfied with the judgment of the State Court aforesaid, said State shall, by the chief executive officer of said State, proceed by *mandamus* against the President of the Senate in the Supreme Court of the United States, by or before the said third Wednesday in December;

such cases shall have precedence over all other cases; they shall be defended by the Electors certified to by the Supreme Court of the State as aforesaid; and, upon order of the Court, the President of the Senate shall produce the two returns from such State for examination and judgment;

judgment shall be rendered in all such cases by or before noon on the first Wednesday in January aforesaid, and shall thereupon be certified under seal of the Court, and delivered to the President of the Senate;

and said certificate of the Supreme Court of the United States shall, at the second meeting of the Houses aforesaid, be conclusive evidence to the President of the Senate of the legal Electors of said State.

SEC. VII.—THE PRESIDENT AND VICE PRESIDENT.

1. The President and Vice President, declared to be elected as herein-before prescribed, shall be President and Vice President of the United States for the ensuing term.

2. The term, for which the President and Vice President shall be elected, shall begin on the fourth day of March A.D. 1881, and thereafter on the fourth day of March next succeeding the expiration of the term of office prescribed by the Constitution.

3. In the event of the death, removal, resignation, or disability of both the President and Vice President, the Secretary of State of the United States, then in office, shall act as President until the disability be removed, or until the beginning of the succeeding term.

4. The evidence of the resignation of the office of President or Vice President shall be an instrument in writing declaring the same, subscribed by the person resigning, and delivered into the office of the Secretary of State.

SEC. VIII.—THE REPEALING CLAUSE.

All Acts or parts of Acts, conflicting with the terms of this Act, are hereby repealed.

APPENDIX.

ACTS, BILLS, AND RECORDS.

CONSTITUTION OF THE UNITED STATES.

We, the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.*

ARTICLE I.

SEC. II.

3. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three; Massachusetts, eight; Rhode Island and Providence Plantations, one; Connecticut, five; New York, six; New Jersey, four; Pennsylvania, eight; Delaware, one; Maryland, six; Virginia, ten; North Carolina, five; South Carolina, five; and Georgia, three.†

ARTICLE II.

SEC. I.

1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected as follows:

2. Each State shall appoint, in such manner as the Legislature thereof may direct, a number of Electors, equal to the whole number of Senators

* Only such portions of the Constitution and other documents are selected as are pertinent to the subject under consideration.

† North Carolina and Rhode Island ratified the Constitution in 1789 and 1790, and the Legislature of New York failed to agree upon a manner of appointing Electors; therefore these three States were unrepresented at the first Opening of the Votes.

and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an Elector.

3. The Electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be President, if such number be a majority of the whole number of Electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose, by ballot, one of them for President; and if no person have a majority, then, from the five highest on the list, the said House shall, in like manner, choose the President. But, in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the Electors, shall be the Vice President. But if there should remain two or more who have equal votes, the Senate shall choose from them, by ballot, the Vice President.*

4. The Congress may determine the time of choosing the Electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

5. No person, except a natural born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President: neither shall any person be eligible to that office, who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

6. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President; and the Congress may by law provide for the case of removal, death, resignation, or inability both of the President and Vice President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

* This clause was superseded in 1804 by the XII. Amendment to the Constitution.

XII. AMENDMENT.

1. The Electors shall meet in their respective States, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other Constitutional disability of the President.
2. The person having the greatest number of votes as Vice President shall be the Vice President, if such number be a majority of the whole number of Electors appointed; and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice.
3. But no person constitutionally ineligible to the office of President, shall be eligible to that of Vice President of the United States.

CONSTITUTION OF MARYLAND.

Adopted 1776.

- XIV. That the Senate be chosen in the following manner: All persons qualified to vote for county Delegates shall, on the first Monday of September in every fifth year, elect by a majority of votes two persons for their Electors of the Senate; the city of Annapolis and Baltimore town shall elect one person for the said city and town respectively.

XV. That the said Electors of the Senate meet at the city of Annapolis, or such other place as shall be appointed for convening the Legislature, on the third Monday of September of every fifth year; and they, or twenty-four of them so met, shall proceed to elect by ballot, either out of their own body or the people at large, fifteen Senators, men of the most wisdom, experience and virtue, above twenty-five years of age.

XVI. That the Senators shall be balloted for at one and the same time; and, out of the gentlemen proposed as Senators, the fifteen who shall, on striking the ballots, appear to have the greatest number in their favor, shall be accordingly declared and returned as duly elected; and if two or more shall have an equal number of ballots in their favor, by which the choice shall not be determined on the first ballot, then the Electors shall again ballot before they separate, in which case they shall be confined to the persons who on the first ballot shall have an equal number; and if the whole number should not thus be made up, because of an equal number on the second ballot being still in favor of two or more persons, then the election shall be determined by lot between those who have equal numbers; which proceedings of the Electors shall be certified under their hands and returned to the Chancellor for the time being.

XVII. That the Electors of Senators shall judge of the qualifications and elections of members of their body; and, on a contested election, shall admit to a seat, as an Elector, such qualified person as shall appear to them to have the greatest number of legal votes in his favor.

XVIII. That the Electors immediately on their meeting, and before they proceed to the election of Senators, shall take an oath "to elect without favor, affection, partiality, or prejudice such persons for Senators as they in their judgment and conscience believe best qualified for the office."

CONSTITUTION OF MASSACHUSETTS.

Adopted 1780.

CHAP. I. The Selectmen of the several towns shall preside at such meetings, and shall receive the votes of all the inhabitants of such towns, present and qualified to vote for Senators; and shall sort and count them in open town meeting, and in presence of the town-clerk, who shall make a fair record, in presence of the Selectmen and in open town meeting, of the name of every person voted for, and of the number of votes against his name.

CHAP. II. Those persons qualified to vote shall give in their votes for Governor to the Selectmen, who shall preside at such meetings; and the town-clerk, in the presence and with the assistance of the Selectmen, shall, in open town meeting, sort and count the votes, and form a list of the persons voted for, with the number of votes for each person, against his name; and shall make a fair record of the same in the town books, and a public declaration thereof in the said meeting; and shall, in the

presence of the inhabitants, seal up copies of the said lists, attested by him and the Selectmen, and transmit the same to the sheriff of the county; and the sheriff shall transmit the same to the Secretary's office; or, the Selectmen may cause the returns to be made to the Secretary of the Commonwealth; and the Secretary shall lay the same before the Senate and House of Representatives, to be by them examined; and in case of an election by a majority of all the votes returned, the choice shall be by them declared and published.

CONSTITUTION OF NEW YORK.

Adopted 1777.

VII. And whereas an opinion hath long prevailed among divers of the good people of this State, that voting at elections by ballot would tend more to preserve the liberty and equal freedom of the people than voting *viva voce*; to the end therefore that a fair experiment be made, which of the two methods of voting is to be preferred:—

Be it ordained, That, as soon as may be after the termination of the present war between the United States of America and Great Britain, an act, or acts, be passed by the Legislature of this State, for causing all elections, thereafter to be held in this State for Senators and Representatives in Assembly, to be by ballot, and directing the manner in which the same shall be conducted.

ACT PASSED FEBRUARY 13, 1787.

XI. A joint committee shall be appointed yearly, and every year, to canvass and estimate the votes.

CONSTITUTION OF NEW HAMPSHIRE.

Adopted 1792.

The meetings for the choice of Governor, Council and Senators shall be governed by a Moderator, who shall, in the presence of the Selectmen, in open meeting, receive the votes; and shall, in said meetings, in presence of the said Selectmen and of the town clerk, sort and count the said votes, and make a public declaration thereof; and the town clerk shall make a fair attested copy thereof, to be by him sealed up and sent to the Secretary of State.

The Secretary shall lay the same before the Senate and House of Representatives, to be by them examined.

CONSTITUTION OF VERMONT.

Adopted 1793.

10. The freemen of each town shall bring in their votes for Governor, with his name fairly written, to the constable, who shall seal them up,

and write on them "Votes for the Governor," and deliver them to the Representatives chosen to attend the General Assembly.

At the opening of the General Assembly, there shall be a committee appointed out of the Council and Assembly, who shall proceed to receive, sort, and count the votes for the Governor, and declare the person, who has the major part of the votes, to be Governor for the ensuing year.

CONSTITUTION OF PENNSYLVANIA.

Adopted 1790.

ART. II. SEC. 2. The returns of every election for Governor shall be sealed up and transmitted to the seat of government, directed to the Speaker of the Senate, who shall open and publish them in the presence of the members of both Houses of the Legislature; the person having the highest number of votes shall be Governor; but if two or more shall be equal and highest in votes, one of them shall be chosen Governor by joint vote of the members of both Houses.

Contested elections shall be determined by a committee to be selected from both Houses of the Legislature, and formed and regulated in such manner as shall be directed by law.

CONSTITUTION OF CONNECTICUT.

Adopted 1818.

ART. IV. SEC. 2. A fair list of the persons and number of votes for each shall be made, and laid before the General Assembly then next to be holden, on the first day of the session thereof; and said Assembly shall, after examination of the same, declare the person whom they shall find to be legally chosen, and give him notice accordingly.

The General Assembly shall, by law, prescribe the manner in which all questions concerning the election shall be determined.

HAMILTON'S PLAN.

*Submitted to the Convention, June 18, 1787.**

ART. IV., SEC. 1. The Judges of the Supreme Court shall, when a vacancy occurs, appoint in each State three several days for the several purposes following, to wit:—a day for commencing the election of Electors, to be called the First Electors; another day for the meeting of the Electors; and another day for the meeting of the Second Electors.

SEC. 2. After notice of vacancy shall have been given, on the day appointed there shall be chosen in each State a number of persons, as the

* The complete text of Alexander Hamilton's system appears in the Appendix to "Madison's Debates." It contemplated the incumbency of a President during good behavior.

First Electors, equal to the whole number of the Representatives and Senators of such State in the Legislature of the United States.

Sec. 3. The First Electors shall meet in their respective States, at the time appointed, in one place; and shall proceed to vote by ballot for a President. They shall cause two lists to be made of the name or names of the person voted for, which they, or the major part of them, shall sign and certify.

They shall then proceed each to nominate openly, in the presence of the others, two persons for Second Electors; and they shall afterwards choose two persons, who shall be the Second Electors, to each of whom shall be delivered one of the lists before mentioned.

Sec. 4. The Second Electors shall meet precisely on the day appointed, and not on any other day, at one place. The Chief Justice of the Supreme Court shall attend at the same place, and shall preside at the meeting, but shall have no vote.

At this meeting the lists delivered to the respective Electors shall be produced and inspected, and if there be any person who has a majority of the whole number of votes given by the First Electors, he shall be the President of the United States. But if there be no such person, the Second Electors so met shall proceed to vote by ballot for one of the persons named in the lists, who shall have the three highest numbers of votes of the First Electors; and if, upon the first or any succeeding ballot, either of those persons shall have a number of votes equal to a majority of the whole number of Second Electors, he shall be the President.

But if no such choice be made on the day appointed for the meeting, either by reason of the non-attendance of the Second Electors, or their not agreeing, or any other matter, the person having the greatest number of the votes of the First Electors shall be the President.

Sec. 7. The Legislature shall, by permanent laws, provide such further regulations as may be necessary for the more orderly election of the President, not contravening the provisions herein contained.

JOURNAL OF THE CONVENTION.

A NATIONAL EXECUTIVE.*

May 29.—Edmund Randolph, of Virginia, presented a series of fifteen resolutions, setting forth his views of a National Government, one of which was the following:—

* Extracts from the Journal are, for obvious reasons, limited to the subject of a National Executive, and, as to that, mainly to the mode and manner of his election.

Pursuant to a resolution of the Congress of the Confederation, made February 21, 1787, delegates from twelve States organized a Convention, May 25, of that year, by electing George Washington president. A journal of their proceedings was kept, and in 1819 was printed by direction of Congress. From that volume these extracts are made.

"Resolved, That a National Executive be instituted, to be chosen by the National Legislature for the term of —— years; to receive punctually at stated times a fixed compensation for the services rendered, in which no increase or diminution shall be made so as to affect the magistracy existing at the time of increase or diminution; and to be ineligible a second time."

Charles Pinckney, of South Carolina, also presented a draft of a Federal Government, in which it was

"Resolved, That the Executive power be vested in a 'President of the United States, of America,' which shall be his style; and his title shall be his 'Excellency.' He shall be elected for —— years, and shall be re-eligible."

[These resolutions were debated in Committee of the Whole for two weeks, before any definite agreement was reached.]

June 1.—"Seven years" was agreed to as the length of his term, but the subject of how and by whom he should be elected was postponed.

2.—Considered the plan of James Wilson, of Pennsylvania, to form "certain districts in each State, which should appoint Electors, to elect outside of their own body;"—postponed.

"To be chosen by the National Legislature, for the term of seven years;"—adopted.

7.—By Elbridge Gerry, of Massachusetts, to amend by making him "elected by the Executives of the several States;"—negated.

18.—Nineteen resolutions were reported to the Convention, founded on those of Mr. Randolph, and these were again referred to the Committee of the Whole.

15.—Wm. Patterson, of New Jersey, submitted a series of resolutions, among which was one authorizing "the United States in Congress assembled" to elect a Federal Executive, "to consist of —— persons, for the term of —— years," and which were also referred to the Committee of the Whole. [This was known as the "Jersey Plan," and proposed to form a new Government by amending the Articles of Confederation.]

18.—Alex. Hamilton, of New York, submitted a plan of government, in which there was a Chief Executive, "his election to be made by Electors, chosen by Electors, chosen by the people;"—referred.

19.—The Committee of the Whole reported that they did not agree to Patterson's resolutions, and returned the nineteen resolutions, as amended.

[From this date the Convention did not go into Committee, but debated these resolutions until the 23d of July.]

July 17.—By Luther Martin, "by Electors, appointed by the Legislatures of the several States;"—negated.

19.—By Oliver Ellsworth, "to be chosen by Electors, appointed for that purpose by the Legislatures of the States;"—approved.

20.—"Electors shall not be members of the National Legislature, or Officers of the Union;"—approved.

24.—By James Wilson, “to choose the Executive by Electors, chosen by lot from the State Legislatures every —— years, the Electors to proceed immediately to elect an Executive, and not to separate till it be made.”

26.—Other resolutions offered for consideration, which were referred to “a committee, who should report a constitution,” and the Convention adjourned to Monday, August 6.

August 6.—The draft of a constitution was submitted by the committee of five.

[It contains no mention of a Vice President, nor had there been such mention to this date.]

Each House of the Legislature should have power “to examine into the qualifications of its own members,” and the Senate were to “choose their own president.”

“Art. X. Sec. I.—The Executive power of the United States shall be vested in a single person. His style shall be ‘The President of the United States of America;’ and his title shall be ‘His Excellency.’ He shall be elected by ballot by the Legislature. He shall hold his office during seven years, but shall not be elected a second time.”

[These resolutions formed the general text for debate until September 8.]

20.—Propositions were offered, and referred to a select committee, which contained the following :

“Each branch of the Legislature, as well as the Supreme Executive, shall have authority to require the opinions of the Supreme Judicial Court upon important questions and upon solemn occasions;”—negatived.

24.—It was moved and seconded “to strike out the word ‘Legislature,’ and to insert the word ‘people,’ in Art. X. Sec. I.;”—negatived.

“To add, after the word ‘Legislature,’ in Art. X. Sec. I., the words ‘each State having one vote;’”—negatived.

“To insert the word ‘joint’ before the word ‘ballot’ in Art. X. Sec. I.;”—approved.

“To insert after the word ‘Legislature,’ in Art. X. Sec. I., the words ‘to which election a majority of the votes of the members present shall be required;’”—approved.

“And in case the numbers for the two highest in votes should be equal, then the President of the Senate shall have an additional casting vote;”—negatived.

Substitute, “Shall be chosen by Electors, to be chosen by the people of the several States;”—negatived.

Substitute, “Shall be chosen by Electors;”—negatived.

[The amended article will exhibit the progress of the Convention, and show that they fully comprehended the idea of a “joint convention” and joint action of the Senate and House, and knew exactly how to express it in language, had they desired it:

2d Clause: “He shall be elected by joint ballot by the Legislature, to

which election a majority of the votes of the members present shall be required.”]

81.—Article XXIII. of this draft was designed to set the wheels of government in motion. After providing for a ratification of the Constitution, it directed the election of Senators and Representatives, and then declared that,—

“To introduce this government it is the opinion of this Convention . . . that the members of the Legislature should meet at the time and place assigned by Congress, and should, as soon as may be after their meeting, choose the President of the United States, and proceed to execute the Constitution.”

It was moved “to strike out ‘choose the President of the United States, and ;’”—approved.

At this point “the questions not yet settled” were referred to a Committee of Eleven, consisting of Messrs. Nicholas Gilman, Rufus King, Roger Sherman, David Brearley, Govv. Morris, Jno. Dickinson, Danl. Carroll, James Madison, Hugh Williamson, Pierce Butler, and Abraham Baldwin.

[To them we owe the electoral clauses of the Constitution, substantially as they are to-day.]

September 4.—The Committee of Eleven reported, and, among other new things, introduced for the first time a “Vice President of the United States.” [The principles underlying the Electoral System seem to have been broadly and comprehensively grasped, though subject to certain improvements, which were subsequently made.]

From the Article relating to the Chief Executive are extracted the following pertinent clauses:

“5th. Each State shall appoint, in such manner as its Legislature may direct, a number of Electors, equal to the whole number of Senators and members of the House of Representatives, to which the State may be entitled in the Legislature.

“6th. The Electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves; and they shall make a list of all the persons voted for, and of the number of votes for each, which list they shall sign and certify, and transmit sealed to the seat of general government, directed to the President of the Senate.

“7th. The President of the Senate shall, in that House, open all the certificates; and the votes shall then and there be counted.

“The person having the greatest number of votes shall be President, if such number be a majority of the whole number of Electors;

“and if there be more than one who have such majority, and have an equal number of votes, then the Senate shall choose by ballot one of them for President;

"but if no person have such majority, then, from the five highest on the list, the Senate shall choose by ballot the President.

"And in every case, after the choice of the President, the person having the greatest number of votes shall be the Vice President; but if there should remain two or more who have equal votes, the Senate shall choose from them the Vice President.

"8th. The Legislature may determine the time of choosing and assembling the Electors, and the manner of certifying and transmitting the votes.

"Sec. 3.—The Vice President shall be *ex-officio* President of the Senate," etc.; "the Vice President, when acting as President of the Senate, shall not have a vote unless the House be equally divided."

After much debate, a consideration of the clauses pertaining to the Executive was postponed.

September 5.—It was moved to substitute, for the foregoing, Section 1, as amended August 24;—negatived.

7th clause; to strike out "if such number be a majority of that of the Electors;"—negatived.

To strike out "Senate," and insert "Legislature;"—negatived.

To strike out "such majority," and insert "one third;"—negatived.

To strike out "five," and insert "three;"—negatived.

To strike out "five," and insert "thirteen;"—negatived.

To add, after "Electors," the words "who shall have balloted;"—negatived.

To add, after "if such number be a majority of the whole number of Electors," the word "appointed;"—approved.

8th clause; to add, after "assembling the Electors," the words "and of giving their votes;"—approved.

September 6.—5th clause; to add, at the end, "But no person shall be appointed an Elector, who is a member of the Legislature of the United States, or who holds any office of profit or trust under the United States;"—approved.

6th clause; that Electors meet "at the seat of general government;"—negatived.

Insert "under the seal of the State" after the word "transmit;"—negatived.

7th clause; to insert "in the presence of the Senate and House of Representatives" after the word "counted;"—approved.

[There is no record of any further amendment to, or change of, that part of the 7th clause to which this addition was made; and it would read exactly as the record runs, as follows:

"The President of the Senate shall, in that House, open all the certificates; and the votes shall then and there be counted, in the presence of the Senate and House of Representatives."]

After "appointed," insert "and who shall have given their votes;"—negatived.

Insert the word "immediately" after "choose;"—approved.

Insert "of the Electors" after "shall have the greatest number of votes;"—approved.

8th clause; add "but the election shall be on the same day throughout the United States," after "transmitting their votes;"—approved.

[There is no record of any further change by specific order of the Convention in the 8th clause; and it would read, exactly as amended, as follows:

"The Legislature may determine the time of choosing and assembling the Electors, and of giving their votes, and the manner of certifying and transmitting their votes; but the election shall be on the same day throughout the United States."]

7th clause; strike out "the Senate shall immediately choose by ballot," etc., and insert "the House of Representatives shall immediately choose by ballot one of them for President, the members of each State having one vote;"—approved.

Whereupon the Journal states, "The several amendments being agreed to on separate questions, Sec. 1 of the report is as follows:" which it proceeds to give in full.

[The record shows that this is done in regular session, so that the section reported undoubtedly appears in the precise sense of the original as amended. The report does correspond accurately with the section above, as amended, until it reaches the 7th clause, wherein is omitted the phrase "in that House;" the phrase "in the presence of the Senate and House of Representatives" is removed from the end of the sentence and substituted in the place of that stricken out; and the semicolon is changed to a comma. From the phrase "the votes shall then and there be counted" are dropped the words "and there," on the same occasion.

These two being the sole changes in phraseology, and since they are so closely connected in sense and time, regard being also had to the significant change of the semicolon to the comma, it would appear that they were deliberate, and by specific order of the Convention.]

September 8.—A committee, "to revise the style and arrange the articles agreed to by the House," was appointed, consisting of Messrs. Johnson, Hamilton, Gouv. Morris, Madison, and King.

[By this committee, as appears in the revised draft accompanying their report, there were made a number of verbal changes, new arrangements of matter and improvements in style and strength, none of which are of moment until Sec. VIII. is reached. Here a whole phrase is dropped without explanation, viz.:

"And the manner of certifying and transmitting their votes."

This clause was submitted to the Convention September 4, in their draft

of a Constitution, by the Committee of Eleven, of which three of this sub-committee of five were members, viz.: Morris, Madison and King.]

September 12.—The revised draft was reported to the Convention by the committee of five.

The Constitution was then submitted to the Convention in detail, and amended and debated until the 17th.

September 13.—Art. XXIII., which was the provision for setting the government in motion, was eliminated, and it became a resolution to accompany the Constitution to the States for ratification.

September 14.—“The report from the committee of revision, as corrected and amended yesterday, being taken up, was read, debated by paragraphs, amended and agreed to, as far as the first clause of the tenth section of the first Article inclusive.”

From the 14th to the 17th of September they “read, debated by paragraphs, amended and agreed to” the rest of the draft, including the Article providing a Chief Executive and the mode of his election.

September 17, 1787, the Convention adjourned *sine die*.

RESOLUTION OF 1787.

*Adopted September 17.**

Resolved, That it is the opinion of this Convention, that as soon as the conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a day on which Electors should be appointed by the States which shall have ratified the same, and a day on which the Electors should assemble to vote for the President, and the time and place for commencing proceedings under this Constitution. That after such publication the Electors should be appointed, and the Senators and Representatives elected. That the Electors should meet on the day fixed for the election of the President, and should transmit their votes, certified, signed, sealed, and directed, as the Constitution requires, to the Secretary of the United States in Congress assembled; that the Senators and Representatives should convene at the time and place assigned; that the Senators should appoint a President of the Senate, for the sole purpose of receiving, opening, and counting the votes for President; and that after he shall be chosen, the Congress, together with the President, should, without delay, proceed to execute the Constitution.

By unanimous order of the Convention,

GEORGE WASHINGTON,

WILLIAM JACKSON, *Secretary.*

President.

* This Resolution, with another of kindred nature, was passed by the Convention as Article XXIII. of the first Constitution drafted, but was extracted September 13, and passed as a complementary edict, of temporary use, however, immediately after the signing of the Constitution. It was afterwards ratified by the eleven States, together with the Constitution.

RESOLUTION OF CONGRESS.

Adopted September 28, 1787, under the Confederation.

Resolved, unanimously, that the said Report, with the Resolutions and letters accompanying the same, be transmitted to the several Legislatures.

RESOLUTION ADOPTED JULY, 1788.

Resolved, That the first Wednesday in January next be the day for appointing the Electors in the several States, which before said day shall have ratified the Constitution; that the first day in February next be the day for the Electors to assemble in their respective States, and vote for a President; and that the first Wednesday in March next be the time, and the present seat of Congress the place, for commencing proceedings under said Constitution.

APPORTIONMENT ACT.

Approved April 14, 1792.

The Act of 1792 apportioned Representatives among the several States as follows:

"Within the State of New Hampshire, four; within the State of Massachusetts, fourteen; within the State of Vermont, two; within the State of Rhode Island, two; within the State of Connecticut, seven; within the State of New York, ten; within the State of New Jersey, five; within the State of Pennsylvania, thirteen; within the State of Delaware, one; within the State of Maryland, eight; within the State of Virginia, nineteen; within the State of Kentucky, two; within the State of North Carolina, ten; within the State of South Carolina, six; within the State of Georgia, two.

ACT OF 1792.*

An act relative to the election of a President and Vice President of the United States, and declaring the officer who shall be President in case of vacancies in the offices both of President and Vice President.

SEC. 1. *Be it enacted*, etc., That, except in cases of the election of a President and Vice President of the United States prior to the ordinary period, as hereinafter specified, Electors shall be appointed in each State, for the election of a President and Vice President of the United States, within thirty-four days preceding the first Wednesday in December, 1792,

* A supplementary Act was passed in 1804, enforcing the provisions of the XII. Amendment, which, however, makes no change in the material part of the Act of 1792.

and within thirty-four days preceding the first Wednesday in December in every fourth year succeeding the last election ; which Electors shall be equal to the number of Senators and Representatives, to which the several States may by law be entitled at the time when the President and Vice President, thus to be chosen, should come into office :

Provided always, That when no apportionment of Representatives shall have been made, after any enumeration, at the time of choosing Electors, then the number of Electors shall be according to the existing apportionment of Senators and Representatives.

SEC. 2. That the Electors shall meet and give their votes on the said first Wednesday in December, at such place in each State as shall be directed by the Legislature thereof; and the Electors in each State shall make and sign three certificates of all the votes by them given, and shall seal up the same, certifying on each that a list of the votes of such State for President and Vice President is contained therein ; and they shall by writing under their hands, or under the hands of a majority of them, appoint a person to take charge of and deliver to the President of the Senate, at the seat of government, before the first Wednesday in January then next ensuing, one of the said certificates : and the said Electors shall forthwith forward, by the post office, to the President of the Senate at the seat of government, one other of the said certificates ; and shall forthwith cause the other of the said certificates to be delivered to the Judge of that District in which the said Electors shall assemble.

SEC. 3. That the Executive authority of each State shall cause three lists of the names of the Electors of such State to be made and certified, and to be delivered to the Electors on or before the said first Wednesday in December ; and the said Electors shall annex one of the said lists to each of the lists of their votes.

SEC. 4. That if a list of votes from any State shall not have been received at the seat of government on the said first Wednesday in January, then the Secretary of State shall send a special messenger to the District Judge, in whose charge such list shall have been lodged, who shall forthwith transmit the same to the seat of government.

SEC. 5. That Congress shall be in session on the second Wednesday in February, 1793, and on the second Wednesday in February succeeding every meeting of the Electors, and the said certificates, or so many of them as shall have been received, shall then be opened, the votes counted, and the persons who shall fill the offices of President and Vice President ascertained and declared agreeably to the Constitution.

SEC. 6. That in case there shall be no President of the Senate at the seat of government on the arrival of the persons intrusted with the lists of the votes of the Electors, then such persons shall deliver the lists of the votes in their custody into the office of the Secretary of State, to be safely kept and delivered over as soon as may be to the President of the Senate.

SEC. 7. That the persons appointed by the Electors to deliver the lists of votes to the President of the Senate shall be allowed, on the delivery of said lists, twenty-five cents for every mile of estimated distance by the most usual road from the place of meeting of the Electors to the seat of government of the United States.

SEC. 8. That if any person appointed to deliver the votes of the Electors to the President of the Senate shall, after accepting his appointment, neglect to perform the services required of him by this Act, he shall forfeit the sum of \$1000.

SEC. 9. That in case of the removal, death, resignation, or disability both of the President and Vice President of the United States, the President of the Senate *pro tempore*, and, in case there shall be no President of the Senate, then the Speaker of the House of Representatives, for the time being, shall act as President of the United States until such disability be removed, or until a President shall be elected.

SEC. 10. That whenever the office of President and Vice President shall both become vacant, the Secretary of State shall forthwith cause a notification thereof to be made to the Executive of every State, and shall also cause the same to be published in at least one of the newspapers printed in each State, specifying that Electors of the President of the United States shall be appointed or chosen in the several States within thirty-four days preceding the first Wednesday in December then next ensuing;

Provided, That there shall be a space of two months between the date of such notification and the said first Wednesday in December; but if there shall not be the space of two months between the date of such notification and the first Wednesday in December, and if the term for which the President and Vice President last in office were elected shall not expire on the third day of March next ensuing, then the Secretary of State shall specify in the notification that the Electors shall be appointed or chosen within thirty-four days preceding the first Wednesday in December in the year next ensuing, within which time the said Electors shall accordingly be appointed or chosen.

And the Electors shall meet and give their votes on the said first Wednesday in December, and the proceedings and duties of the said Electors and others shall be pursuant to the directions prescribed in this Act.

SEC. 11. That the only evidence of a refusal to accept, or of a resignation of, the offices of President and Vice President shall be an instrument in writing declaring the same, and subscribed by the person refusing to accept or resigning, as the case may be, and delivered into the office of the Secretary of State.

SEC. 12. That the term of four years, for which the President and Vice President shall be elected, shall in all cases commence on the fourth day of March next succeeding the day on which the votes of the Electors shall have been given.

ACT OF 1845.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,

That the Electors of President and Vice President shall be appointed in each State on the Tuesday next after the first Monday in the month of November of the year in which they are to be appointed:

Provided, That each State may by law provide for the filling of any vacancy or vacancies which may occur in its College of Electors when such college meets to give its electoral vote:

And provided also, When any State shall have held an election for the purpose of choosing Electors, and shall fail to make a choice on the day aforesaid, then the Electors may be appointed on a subsequent day in such manner as the State shall by law provide.

BILL OF 1800.*

SEC. 1. On the day before the second Wednesday in February, each House shall choose by ballot six persons, who, with the Chief Justice of the United States (or one of the Associate Justices), shall form a Grand Committee, "and shall have power to examine and finally decide all disputes" relative to the election of President and Vice President of the United States.

SEC. 2. All the Judges of the Supreme Court shall assemble at the seat of government on the same day, and remain till the proceedings are concluded.

SEC. 3. Each House shall then proceed to choose by ballot two tellers, who shall receive the certificates and note down their contents.

SEC. 4. The minutes of the tellers being compared, and the oaths being administered to the members of the Grand Committee, "the President of the Senate shall deliver to the Chairman of the Grand Committee all the certificates of the Electors, and all the certificates and other documents transmitted by them, or by the executive authority of any State, and all the petitions, exceptions, and memorials against the votes of the Electors and the persons for whom they have voted, together with the testimony accompanying the same."

SEC. 5. The Chief Justice shall act as Chairman of the Grand Committee, and they shall sit daily, with closed doors, a majority of the members constituting a quorum.

SEC. 6. The Grand Committee shall have power to send for persons,

* This Bill appears in the "Annals" only in fragments, but it was published in full in the Philadelphia "Aurora" of that year, whence the above abridgment is made. Section 8, the most important, is copied verbatim.

papers, and records, to administer oaths, and to punish witnesses refusing to answer "as fully and absolutely as the Supreme Court of the United States may and can do in cases depending therein."

SEC. 7. The marshals of the several districts of the United States shall serve the processes, etc.

SEC. 8. "The Grand Committee shall have power to inquire, examine, decide, and report upon the constitutional qualifications of persons voted for as President and Vice President of the United States, upon the constitutional qualifications of the Electors appointed by the different States, and whether their appointment was authorized by the State Legislature or not; upon all petitions and exceptions against corrupt, illegal conduct of the Electors, or force, menaces, or improper means used to influence their votes, or against the truth of their returns, or the time, place, or manner of giving their votes;

Provided always that no petition or exception shall be granted, allowed, or considered by the sitting Grand Committee, which has for its object to dispute or draw into question the number of votes given for an Elector in any of the States, or the fact whether an Elector was chosen by a majority of the votes in his State or district."

SEC. 9. The Committee shall appoint a clerk of record.

SEC. 10. On the first day of March next the Committee shall report to the Senate and House of Representatives, stating the legal number of votes for each person, and the number of votes which have been rejected.

SEC. 11. When once formed, neither House shall dissolve the Committee nor withdraw its members.

SEC. 12. The Executive of each State shall furnish the Electors three copies of the law under which they are chosen or appointed, to be annexed to the three lists of their votes.

SEC. 13. All petitions, etc., concerning the election shall be presented and read in the Senate, and retained until transferred to the Committee.

SEC. 14. Testimony shall be taken under the regulation prescribing it in the case of members of the House of Representatives.

AN AMENDMENT.

[An amendment offered in the Senate March 25, by P. N. Nicholas, of Virginia, which was to be substituted for the first ten sections, with the intent of modifying their extravagant and dangerous provisions, but which was defeated, contains the following language:]

"The Constitution of the United States having directed that the 'President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and that the votes shall then be counted,' from which the reasonable inference and practice has been that they are to be counted by the members composing the said Houses, and brought there for that office, no other being assigned them, and inferred

the more reasonably, as thereby the constitutional weight of each State in the election of those high officers is exactly preserved in the tribunal which is to judge of its validity, the number of Senators and Representatives from each State, composing the said tribunal, being exactly that of the Electors of the same State," etc.

[March 28 the Bill passed the Senate by a majority of 16 to 12, Baldwin, Langdon and Pinckney, the three members of the Federal Convention, opposing.]

THE HOUSE AMENDMENT.

[It was amended in a number of particulars by the House, and, among others, through the efforts of John Marshall, by withdrawing the Judges of the Supreme Court from all participation in the matter and requiring the report of the Committee to be supervised by the Houses.]

Therein it was provided that on an exception taken by any member to the Committee's report, he should "sign his name thereto, and if it be founded on any circumstances appearing in the report of the joint committee, and the exception be seconded by one member from the Senate, and one from the House of Representatives, each of whom shall sign the said exception, as having seconded the same, then each House shall immediately retire, without question or debate, to its own apartment, and shall take the question on the exception, without debate, by ayes and noes. So soon as the question shall be taken in either House, a message shall be sent to the other, informing them that the House sending the message is prepared to resume the count; and when such message shall have been received by both Houses, they shall again assemble in the same apartment as before, and the count shall be resumed.

"And if the two Houses have concurred in rejecting the vote or votes objected to, such vote or votes shall not be counted; but, unless both Houses concur, such vote or votes shall be counted.

"If the objection taken as aforementioned, shall arise on the face of the papers opened by the President of the Senate, in the presence of both Houses, and shall not have been noticed in the report of the joint Committee, such objection may be referred to the joint Committee, to be examined and reported on by them, in the same manner, and on the same principles, as their first report was made; but, if both Houses do not concur in referring the same to the Committee, then such objection shall be decided on in the like manner as if it had been founded on any circumstances appearing in the report of the Committee."

[May 2, the Bill, as amended, requiring the Houses to concur in "rejecting" a vote, passed the House by a vote of 52 to 87, and was returned to the Senate.

May 8, the Senate amended by substituting the word "admitting" for the word "rejecting."

[May 9, the House refused to agree, by a vote of 78 to 15; May 10, the Senate refused to recede, and the Bill was lost.]

PINCKNEY'S SPEECH.

[Before the question was taken on the passage of the Bill of 1800, Mr. Pinckney addressed the Chair as follows :*]

Mr. President, the question now before the Senate is on the passage of the Bill.

It having been understood as agreed that we would reserve ourselves on its constitutionality until this period, I have some claim to expect your indulgence, while I review, not only that subject, but the principal features of the Bill—while I endeavor to show that it is a serious invasion of some of the most important rights solemnly and explicitly reserved by the Constitution to the State Legislatures.

I suppose it will hardly yet be denied that the people are the common fountain of authority to both the Federal and State Governments ; that the Constitution reposes exclusively in the State Legislatures for the formation of a part of the Federal Government, and in the people for another part ; and that in the appointment or formation of their part the rights of the State Legislatures and people are exclusive ; that the State Governments are the pillars upon which the Federal Government must rest, and that without a cordial and active performance of their duty the latter could not proceed or exist ; that in the formation of the Federal Government the people found that their safety consisted in giving certain exclusive rights to the State Legislatures, in the election of Senators and of their President,—the first to insure to the State Governments their exist-

* Charles Pinckney, one of the framers of the Constitution, together with two other members of the Convention of 1787, opposed the Bill of 1800 strenuously. Before its amendment by the House, on March 28, he delivered in the Senate the admirable speech from which these extracts are taken. It is unquestionably the finest exposition of the subject, on high Constitutional grounds, ever made in Congress, and it is a masterly refutation of the claims of the Houses to canvass the votes,—the only point which he was discussing. The speech is quoted in full in the "Presidential Counts," published by D. Appleton & Co., New York, 1877.

Of this speech the Philadelphia "Aurora" of April 2, says: "By our absence from the Senate gallery we are not able to report the debate over the passage of the Bill the third time, nor to take notes of the speech of Mr. Charles Pinckney on that occasion, which we understand to have been generally allowed to have been equal in eloquence and strength of reasoning to anything ever delivered in the halls of Congress."

The value of Mr. Pinckney's defence of the Constitution is enhanced a hundred fold by the fact that he, a Federalist and a candidate for President on that ticket in the fall of this same year, was the unrelenting opponent of a political measure offered by his own party.

ence as such, and their equality in the second branch, and the other to make their Executive completely independent of the national Legislature.

In examining these exclusive rights, we will at once perceive that, in the mode of voting for Senators, no other part of our Government can interfere with our State Legislatures; if they neglect or refuse to elect, there is no power to compel them.

By the Constitution, Electors of a President are to be chosen in the manner directed by the State Legislatures—this is all that is said. In case the State Legislatures refuse to make these directions there is no power to compel them; there is not a single word in the Constitution which can, by the most tortured construction, be extended to give Congress, or any branch or part of our Federal Government, a right to make or alter the State Legislatures' directions on this subject.

The right to make these directions is complete and conclusive, subject to no control or revision, and placed entirely with them, for the best and most unanswerable reasons. It was intended to give your President the command of your forces, the disposal of all the honors and offices of your Government, the management of your foreign concerns, and the revision of your laws. Invested with these important powers, it was easily to be seen that the honor and interest of your Government required he should execute them with firmness and impartiality; that, to do this, he must be independent of the Legislature; that they must have no control over his election; that the only mode to prevent this was to give the exclusive direction to the State Legislatures in the mode of choosing Electors, who should be obliged to vote secretly; and that the vote should be taken in such manner, and on the same day, as to make it impossible for the different States to know who the Electors are for, or for improper domestic, or, what is of much more consequence, foreign influence and gold to interfere; that by doing this the President would really hold his office independent of the Legislature; that instead of being the creature, he would be the man of the people; that he would have to look to them, and to the confidence which he felt his own meritorious actions would inspire, for applause or subsequent appointments.

As long and as much as I have been accustomed to examine this Bill and consider its contents, I cannot recapitulate its objects and extent without new emotions of surprise. I am astonished that a measure so completely calculated to deprive the State Legislatures of their most important and exclusive rights in the elections of the Chief Magistrate should be brought forward.

Knowing that it was the intention of the Constitution to make the President completely independent of the Federal Legislature, I well remember it was the object, as it is at present not only the spirit but the letter of that instrument, to give to Congress no interference in or control over the

election of President. It is made their duty to *count over* the votes in a convention of both Houses, and for the President of the Senate to *declare* who has the majority of the votes of the Electors so transmitted. It never was intended, nor could it have been safe, in the Constitution, to have given to Congress, thus assembled in convention, the right to object to any vote, or even to question whether they were constitutionally or properly given. This right of determining on the manner in which the Electors shall vote, the inquiry into the qualifications, and the guards necessary to prevent disqualified or improper men voting, and to insure the votes being legally given, rests and is exclusively vested in the State Legislatures. If it is necessary to have guards against improper elections of Electors, and to institute tribunals to inquire into their qualifications, with the State Legislatures, and with them alone, rests the power to institute them, and they must exercise it. To give to Congress, even when assembled in convention, a right to reject or admit the votes of States, would have been so gross and dangerous an absurdity as the framers of the Constitution never could have been guilty of. How could they expect that, in deciding on the election of a President, particularly where such election was strongly contested, party spirit would not prevail, and govern every decision? Did they not know how easy it was to raise objections against the votes of particular elections, and that in determining upon these it was more than probable the members would recollect their *sides*, their favorite candidate, and sometimes their own interests? Or must they have not supposed that, in putting the ultimate and final decision of the Electors in Congress, who were to decide irrevocably and without appeal, they would render the President their creature, and prevent his assuming and exercising that independence in the performance of his duties upon which the safety and honor of the Government must forever rest?

Surely, its friends never could have considered the extent and danger of giving to this committee, or even to Congress, the right to decide on double returns, or they must immediately have seen the extreme impropriety of attempting it. It is, in short, nothing less than holding out to the minority in all the States a temptation to dispute every election, and to always bring forward double returns.

Can there be any one who would thus hazard the reserved rights of the State Legislatures and the people, and commit them to a body unknown to and unauthorized by the Constitution?

Why should we suppose that the Congresses which have preceded us did not understand this subject as well as we do, or any that may succeed us?

In 1792, being the first time the exercise of this power was necessary, Congress passed a law, entitled "An act relative to the election of President and Vice President." This law was passed when a number of able and well-informed men, who have been since appointed to some of your most respectable situations at home and abroad, and many who have

voluntarily retired with deserved and well-earned honor to private life, filled the seats of both Houses of Congress; when the Executive authority was held by General Washington, for whom your whole nation at present mourns; by him who had no rival in the public affection, whose honors no man envied, and whose re-election to office as long as he pleased, he well knew, would always have been without contest; in him was placed the revision of your laws. And here, sir, let me ask whether from a Congress thus ably formed, and from an Executive thus discerning and independent, as much knowledge of the Constitution, its precise directions, and the agency it intended Congress to have in the counting the votes and declaring the President, were not to have been expected, as from the present? Were not the then Executive, and a number of the members of both Houses, members of the Convention which framed the Constitution; and if it intended to give to Congress, or authorize them to delegate to a committee of their body, powers contemplated by this Bill, could the Congress or the President of 1792 have been so extremely uninformed, and indeed ignorant, of its meaning and of their duty, as not to have known it?

If, after comparing these circumstances, our citizens should carefully peruse the express directions of the Constitution, they will have but little doubt to which Act to give the preference, as the proper and constitutional one.

The Constitution expressly orders that the Electors shall vote by ballot, and we all know that to vote by ballot is to vote secretly; that the votes shall be sealed up, and not opened until the day appointed by law, and that if no election has been made by the Electors an immediate one shall take place by the House of Representatives; that, so far from appointing committees to receive memorials or petitions respecting the election, or to decide upon it, or, so far from having any right to delegate an authority on this subject, Congress shall not themselves, even when in convention, have the smallest power to decide on a single vote; that they shall not have authority to adjourn for a single moment, but shall instantly and on the spot, in case of no election by the Electors, proceed to the choice of President, and not separate until it is determined.

I could urge a variety of other objections against this Bill, but I am afraid I have already too long trespassed on your patience. I will, therefore, here conclude my remarks with entreating the House not to destroy the beautiful harmony and safety which the Constitution at present insures, both to the States and the General Government; a safety which must depend on a strict adherence to its principles, and to the judicious distribution of its authorities; that, while the States are wisely prohibited from interfering with those really national powers which can alone be safely exercised by the General Government, for the purposes of national defence and protection, the Government is in its turn checked from over-

stepping the boundaries of the Constitution, by the reserved powers to the States and the people, and by their exclusive rights of election, as I have fully stated to you. Instead of injuring, let it be our care to preserve unimpaired this valuable System. I should be sorry that any part of the Government should be chargeable with a wish to violate it; but, feeling as we must always do a particular affection for that branch of it to which we belong, I should be extremely sorry indeed that this Bill should pass the Senate.

Let us remember that the election is intended by the Constitution, once in every four years, as an appeal to the people for their opinions respecting the preceding Administration. If the conduct of the Executive has been wise, disinterested and impartial, there can be no doubt that the good sense and virtue of our citizens will continue him in office, or, if he wishes to decline, elect a successor of similar principles. On the contrary, if he has not proved himself able and judicious, and the measures of his Administration do not accord with the public sentiment, they will have an opportunity, mildly and gently, through the force of the elective principle, to remove him, and place in his stead some man of different political conduct and opinions. This appeal, however, can never be fairly and independently made to the people, if Congress are to have the smallest control or revision of the election, because the majority of them must always be intimately connected with the measures of the Administration.

ACT OF 1865.*

Whereas, The inhabitants and local authorities of the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, and Tennessee, rebelled against the Government of the United States, and were in such condition on the 8th day of November, 1864, that no valid election of Electors for President and Vice President of the United States, according to the Constitution and laws thereof, was held therein on said day: therefore—

Be it Resolved, by the Senate and House of Representatives of the United States of America, in Congress assembled, That the States mentioned in the preamble to this joint resolution are not entitled to repre-

* This Act was passed in order to annul the effect of "the Amnesty Proclamation," issued December 8, 1863, and to reject the electoral votes of Louisiana and Tennessee. The President signed it under great pressure and only to avoid an impending rupture between Congress and himself, on February 8, 1865, after the Opening of the Votes had begun; at the same time he records that "it has been signed by the Executive in deference to the view of Congress implied in its passage and presentation to him," and disclaimed that "by signing such resolution he has expressed any opinion on the recitals of the preamble, or any judgment of his own on the subject of the resolution."

sentation in the Electoral College for the choice of President and Vice President of the United States for the term commencing on the 4th day of March, 1864, and no electoral votes shall be received or counted from said States, concerning the choice of President and Vice President for said term of office.

22D JOINT RULE.*

The two Houses shall assemble in the hall of the House of Representatives at the hour of one o'clock P.M., on the second Wednesday in February next succeeding the meeting of the Electors of President and Vice President of the United States, and the President of the Senate shall be their presiding officer; one teller shall be appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, the certificates of the electoral votes; and said tellers, having read the same in the presence and hearing of the two Houses then assembled, shall make a list of the votes as they shall appear from the said certificates; and the votes having been counted, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote and the names of the persons, if any, elected; which announcement shall be deemed a sufficient declaration of the persons elected President and Vice President of the United States, and, together with a list of the votes, be entered on the journals of the two Houses.

If upon the reading of any such certificate by the tellers any question shall arise in regard to counting the votes therein certified, the same having been stated by the presiding officer, the Senate shall thereupon withdraw, and said question shall be submitted to that body for its decision; and the Speaker of the House of Representatives shall, in like manner, submit said question to the House of Representatives for its decision; and no question shall be decided affirmatively and no vote objected to shall be counted except by the concurrent votes of the two Houses; which being obtained, the two Houses shall immediately reassemble and the presiding officer shall then announce the decision of the question submitted, and upon any such question there shall be no debate in either House; and any other question pertinent to the object for which the two Houses are assembled may be submitted and determined in like manner.

At such joint meeting of the two Houses seats shall be provided as follows: for the President of the Senate, the Speaker's chair; for the

* This Rule was passed hastily and secretly on January 30, 1865, in order to forestall the failure of the foregoing Bill to become a law, and to reject the votes of Louisiana and Tennessee thereby. It is part of the Senate Bill of 1860 under a disguised phraseology.

Speaker, a chair immediately upon his left; the Senators in the body of the hall, upon the right of the presiding officer; for the Representatives, in the body of the hall not occupied by the Senators; for the tellers, secretary of the Senate, and clerk of the House of Representatives, at the clerk's desk; for the other officers of the two Houses, in front of the clerk's desk, and upon either side of the Speaker's platform.

Such joint meeting shall not be dissolved until the electoral votes are all counted and the result declared; and no recess shall be taken unless a question shall have arisen in regard to counting any of such votes, in which case it shall be competent for either House, acting separately, in the manner hereinbefore provided, to direct a recess, not beyond the next day at the hour of one o'clock P.M.

BILL OF 1875-6.*

That the Senate and House of Representatives shall assemble in the hall of the House of Representatives, at the hour of one o'clock P.M., on the last Wednesday in January next succeeding the meeting of the Electors of President and Vice President of the United States, and the President of the Senate shall be their presiding officer; two tellers shall be appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, the certificates of the electoral votes, which certificates shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having read the same in the presence and hearing of the two Houses then assembled, shall make a list of the votes as they shall appear from the said certificates; and, the votes having been counted, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, and the names of the persons, if any, elected, which announcement shall be deemed a sufficient declaration of the persons elected President and Vice President of the United States, and, together with a list of the votes, be entered on the journals of the two Houses.

If, upon the reading of any such certificate by the tellers, any question shall arise in regard to counting the votes therein certified, the same having been stated by the presiding officer, the Senate shall thereupon withdraw, and said question shall be submitted to the body for its decision; and the Speaker of the House of Representatives shall in like man-

* The Bill was offered in the Senate January 26, 1875, and on February 25 was passed by that body; not receiving the sanction of the House, it was revived in the Senate March 13, 1876, again passed, and again lost in the House. It was known popularly as "Morton's Bill," and was a re-enactment of the House Bill of 1800 and of the 22d Joint Rule.

ner submit said question to the House of Representatives for its decision; and no electoral vote or votes from any State, to the counting of which objections have been made, shall be rejected, except by the affirmative vote of the two Houses. When the two Houses have voted, they shall immediately reassemble, and the presiding officer shall then announce the decision of the question submitted.

SEC. 2. That if more than one return shall be received by the President of the Senate from a State, purporting to be the certificates of electoral votes given at the last preceding election for President and Vice President in such State, all such returns shall be opened by him in the presence of the two Houses when assembled to count the votes; and that return, and that only, from such State shall be counted which the two Houses, acting separately, shall decide to be the true and valid return.

SEC. 3. That when the two Houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any State, each Senator and Representative may speak to such objection or question ten minutes, and not oftener than once: *Provided*, That after such debate has lasted two hours it shall be the duty of each House to put the main question without further debate.

SEC. 4. At such joint meeting of the two Houses, seats shall be provided as follows: For the President of the Senate, the Speaker's chair; for the Speaker, immediately upon his left; the Senators in the body of the hall upon the right of the presiding officer; for the Representatives, in the body of the hall not provided for the Senators; for the tellers, secretary of the Senate, and clerk of the House of Representatives, at the clerk's desk; for the other officers of the two Houses, in front of the clerk's desk and upon each side of the Speaker's platform.

Such joint meeting shall not be dissolved until the electoral votes are all counted and the result declared; and no recess shall be taken unless a question shall have arisen in regard to counting any such votes, in which case it shall be competent for either House, acting separately, in the manner hereinbefore provided, to direct a recess of such House not beyond the next day at the hour of ten o'clock in the forenoon.

ACT OF 1877.*

A Bill to provide for and regulate the counting of votes for President

* This Bill, popularly known as the "Electoral Bill" and establishing an "Electoral Commission," was offered in the Senate January 18, 1877, by the conservative Republicans as a compromise with the Democrats of the House, at the demand of the people. Its basis was the Senate Bill of 1800, modified by the House Bill of that date. The justness of decisions under it depended entirely on the justice animating the "Commission," which was simply a political body, instituted for political purposes.

and Vice President, and the decision of questions arising thereon, for the term commencing March 4, A.D. 1877.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That the Senate and House of Representatives shall meet in the hall of the House of Representatives at the hour of one o'clock, post meridian, on the first Thursday in February, A.D. 1877, and the President of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted as in this Act provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote and the names of the persons, if any, elected, which announcement shall be deemed a sufficient declaration of the persons elected President and Vice President of the United States, and, together with a list of the votes, shall be entered on the journals of the two Houses.

Upon such reading of any such certificate or paper, when there shall be only one return from a State, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one member of the House of Representatives, before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision, and the Speaker of the House of Representatives shall in like manner submit such objections to the House of Representatives for its decision, and no electoral vote or votes, from any State from which but one return has been received, shall be rejected except by the affirmative vote of the two Houses.

When the two Houses have voted they shall immediately again meet, and the presiding officer shall then announce the decision of the question submitted.

SEC. 2. That if more than one return or paper, purporting to be a return from a State, shall have been received by the President of the Senate, purporting to be the certificates of electoral votes given at the last preceding election for President and Vice President in such State, unless they shall be duplicates of the same return, all such returns and papers shall be opened by him in the presence of the two Houses, when met as

aforesaid, and read by the tellers; and all such returns and papers shall thereupon be submitted to the judgment and decision, as to which is the true and lawful electoral vote of such State, of a Commission constituted as follows, namely:

During the session of each House on the Tuesday next preceding the first Thursday in February, 1877, each House shall by *viva voce* vote appoint five of its members, who, with the five Associate Justices of the Supreme Court of the United States, to be ascertained as hereinafter provided, shall constitute a Commission for the decision of all questions upon or in respect of such double returns named in this section. On the Tuesday next preceding the first Thursday in February, A.D. 1877, or as soon thereafter as may be, the Associate Justices of the Supreme Court of the United States, now assigned to the First, Third, Eighth, and Ninth Circuits, shall select, in such manner as a majority of them shall deem fit, another of the Associate Justices of said Court, which five persons shall be members of the said Commission; and the person longest in commission of said five Justices shall be the President of said Commission. Members of said Commission shall respectively take and subscribe the following oath:

"I, ——, do solemnly swear (or affirm, as the case may be) that I will impartially examine and consider all questions submitted to the Commission of which I am a member, and a true judgment give thereon, agreeably to the Constitution and the laws, so help me God."

Which oath shall be filed with the Secretary of the Senate.

When the Commission shall have been thus organized, it shall not be in the power of either House to dissolve the same, or to withdraw any of its members; but if any such Senator or member shall die or become physically unable to perform the duties required by this Act, the fact of such death or physical inability shall be by said Commission, before it shall proceed further, communicated to the Senate or House of Representatives, as the case may be, which body shall immediately and without debate proceed by *viva voce* vote to fill the place so vacated, and the person so appointed shall take and subscribe the oath hereinbefore prescribed, and become a member of said Commission; and, in like manner, if any of said Justices of the Supreme Court shall die or become physically incapable of performing the duties required by this Act, the other of said Justices, members of the said Commission, shall immediately appoint another Justice of said Court a member of said Commission (and in such appointments regard shall be had to the impartiality and freedom from bias sought by the original appointments to said Commission) who shall thereupon immediately take and subscribe to the oath hereinbefore prescribed, and become a member of said Commission to fill the vacancy so occasioned.

All the certificates and papers purporting to be certificates of the electoral votes of each State shall be opened in the alphabetical order of the

States as provided in Section 1 of this Act; and when there shall be more than one such certificate or paper, as the certificates or papers from such State shall so be opened (excepting duplicates of the same return), they shall be read by the tellers, and thereupon the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one member of the House of Representatives before the same shall be received.

When all such objections so made to any certificate, vote or paper from a State shall have been received and read, all such certificates, votes and papers so objected to, and all papers accompanying the same, together with such objections, shall be forthwith submitted to said Commission, which shall proceed to consider the same, with the same powers, if any, now possessed for that purpose by the two Houses, acting separately or together, and, by a majority of votes, decide whether any and what votes from such State are the votes provided for by the Constitution of the United States, and how many and what persons were duly appointed Electors in such State; and may therein take into view such petitions, depositions, and other papers, if any, as shall, by the Constitution and now existing law, be competent and pertinent in such consideration, which decision shall be made in writing, stating briefly the ground thereof, and signed by the members of said Commission agreeing therein; whereupon the two Houses shall again meet, and such decision shall be read and entered in the journal of each House, and the counting of the votes shall proceed in conformity therewith, unless, upon objection made thereto in writing by at least five Senators and five members of the House of Representatives, the two Houses shall separately concur in ordering otherwise, in which case such concurrent order shall govern. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

SEC. 3. That while the two Houses shall be in meeting, as provided in this Act, no debate shall be allowed, and no question shall be put by the presiding officer, except to either House on a motion to withdraw, and he shall have power to preserve order.

SEC. 4. That when the two Houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any State, or upon objection to a report of said Commission, or other question arising under this Act, each Senator or Representative may speak on such objection or question ten minutes, and not oftener than once; but, after such debate shall have lasted two hours, it shall be the duty of each House to put the main question without further debate.

SEC. 5. That at such joint meeting of the two Houses seats shall be provided, as follows:

For the President of the Senate, the Speaker's chair; for the Speaker, immediately upon his left; the Senators in the body of the hall, upon the right of the presiding officer; for the Representatives, in the body of the hall not provided for the Senators; for the tellers, secretary of the Senate, and clerk of the House of Representatives, at the clerk's desk; for the other officers of the two Houses, in front of the clerk's desk, and upon each side of the Speaker's platform.

Such joint meeting shall not be dissolved until the count of the electoral votes shall be completed and the result declared, and no recess shall be taken unless a question shall have arisen in regard to counting any such votes or otherwise under this Act; in which case it shall be competent for either House, acting separately, in the manner hereinbefore provided, to direct a recess of such House, not beyond the next day, Sunday excepted, at the hour of ten o'clock in the forenoon; and while any question is being considered by said Commission, either House may proceed with its legislative or other business.

Sec. 6. That nothing in this Act shall be held to impair or affect any right now existing under the Constitution and laws to question by proceeding in the judicial courts of the United States the right or title of the person who shall be declared elected, or who shall claim to be President or Vice President of the United States, if any such right exists.

Sec. 7. That said Commission shall make its own rules, keep a record of its proceedings, and shall have power to employ such persons as may be necessary for the transaction of its business and the execution of its powers.

ANNALS OF CONGRESS.

1789.

*Senate, April 6.**

The credentials of the members present being read and ordered to be filed, the Senate proceeded, by ballot, to the choice of a President, for the sole purpose of opening and counting the votes for President of the United States.

John Langdon was elected.

Ordered, That Mr. Ellsworth inform the House of Representatives that a quorum of the Senate is formed; that a President is elected for the sole purpose of opening the certificates, and counting the votes of the Electors of the several States in the choice of a President and Vice

* These proceedings were partly under the Resolution of 1787, and partly under the provisions of the Constitution. They are extracts from the "Annals of Congress," and are taken from the "Presidential Counts," published by D. Appleton & Co., New York, 1877, and from "Counting the Electoral Votes," published by order of the House of Representatives, Dec. 13, 1876.

President of the United States; and that the Senate is now ready, in the Senate chamber, to proceed, in the presence of the House, to discharge that duty; and that the Senate have appointed one of their members to sit at the clerk's table to make a list of the votes as they shall be declared; submitting it to the wisdom of the House to appoint one or more of their members for the like purpose.

Mr. Ellsworth reported that he had delivered the message; and Mr. Boudinot, from the House of Representatives, informed the Senate that the House is ready forthwith to meet them, to attend the opening and counting of the votes of the Electors of the President and Vice President of the United States.

The Speaker and the members of the House of Representatives attended in the Senate chamber; and the President elected for the purpose of counting the votes declared that the Senate and House of Representatives had met, and that he, in their presence, had opened and counted the votes of the Electors for President and Vice President of the United States, which were as follows:

STATES.	Geo. Washington, Esq.	John Adams, Esq.	Samuel Huntington, Esq.	John Jay, Esq.	John Hancock, Esq.	Robert H. Harrison, Esq.	George Clinton, Esq.	John Rutledge, Esq.	John Milton, Esq.	James Armstrong, Esq.	Edward Telaire, Esq.	Benjamin Lincoln, Esq.
New Hampshire.....	5	5	...	...	...	...	...	...	...	...	...	...
Massachusetts.....	10	10	...	...	...	...	...	...	...	...	...	...
Connecticut.....	7	5	2	...	...	...	...	...	...	...	...	...
New Jersey.....	6	1	...	5	...	...	...	...	...	...	...	...
Pennsylvania.....	10	8	...	...	2	...	...	...	...	...	...	...
Delaware.....	3	...	...	3	...	...	...	...	...	...	...	...
Maryland.....	6	...	...	...	...	6	...	...	...	...	...	...
Virginia.....	10	5	...	1	1	...	3	...	...	...	...	...
South Carolina.....	7	...	...	...	1	...	...	6	...	...	...	...
Georgia.....	5	...	...	...	...	...	...	...	2	1	1	1
Total.....	69	34	2	9	.4	6	3	6	2	1	1	1

Whereby it appeared that George Washington, Esq., was elected President, and John Adams, Esq., Vice President of the United States of America.

Mr. Madison, from the House of Representatives, thus addressed the Senate:

"Mr. President: I am directed by the House of Representatives to in-

form the Senate, that the House have agreed that the notifications of the election of the President and of the Vice President of the United States should be made by such persons, and in such manner, as the Senate shall be pleased to direct."

House, April 6.

A message from the Senate, by Mr. Ellsworth:

"Mr. Speaker, I am charged by the Senate to inform this House, that a quorum of the Senate is now formed; that a President is elected for the sole purpose of opening the certificates and counting the votes of the Electors of the several States, in a choice of a President and Vice President of the United States; and that the Senate is now ready in the Senate chamber, to proceed, in the presence of this House, to discharge that duty. I have it also in further charge to inform this house that the Senate has appointed one of its members to sit at the clerk's table to make a list of the votes as they shall be declared, submitting it to the wisdom of this House to appoint one or more of its members for the like purpose."

On motion,

Resolved, That Mr. Speaker, attended by the House, do now withdraw to the Senate chamber, for the purpose expressed in the message from the Senate; and that Mr. Parker and Mr. Heister be appointed, on the part of this House, to sit at the clerk's table with the members of the Senate, and make a list of the votes as the same shall be declared.

Mr. Speaker accordingly left the chair, and, attended by the House, withdrew to the Senate chamber, and after some time returned to the House.

Mr. Speaker resumed the chair. Mr. Parker and Mr. Heister then delivered in at the clerk's table a list of the votes of the Electors of the several States in the choice of a President and Vice President of the United States, as the same were declared by the President of the Senate, in the presence of the Senate and of this House, which was ordered to be entered on the journal.

NOTIFICATION CERTIFICATE.

Be it known that the Senate and House of Representatives of the United States of America, being convened in the city and State of New York, the sixth of April, in the year of our Lord one thousand seven hundred and eighty-nine, the underwritten, appointed President of the Senate for the sole purpose of receiving, opening and counting the votes of the Electors, did, in the presence of said Senate and House of Representatives, open all the certificates and count all the votes of the Electors for President and Vice President, by which it appears that George Wash-

ington, Esquire, was unanimously elected, agreeably to the Constitution, to the office of President of the United States of America.

JOHN LANGDON.

[A similar certificate was transmitted to John Adams, in which "duly" was substituted for "unanimously."]

1793.

Senate, February 5.

A message from the House of Representatives informed the Senate that the House of Representatives have resolved that a committee be appointed, to join such committee as may be appointed by the Senate, to ascertain and report a mode of examining the votes for President and Vice President, and of notifying the persons who shall be elected of their election; and for regulating the time, place and manner of administering the oath of office to the President, and have appointed a committee on their part.

Senate, February 6.

Resolved, That the Senate concur in this resolution, and that Messrs. King, Izard and Strong be the committee on the part of the Senate.

Senate, February 11.

Mr. King, from the joint committee appointed the 6th February instant, reported,—

That the two Houses shall assemble on Wednesday next at twelve o'clock; that one person be appointed a teller on the part of the Senate to make a list of the votes as they shall be declared; that the result shall be delivered to the President of the Senate, who shall announce the state of the vote, and the persons elected, to the two Houses assembled as aforesaid; which shall be deemed a declaration of the persons elected President and Vice President, and together with a list of the votes be entered on the journals of the two Houses.

Senate, February 13.

Ordered, That the secretary notify the House of Representatives that the Senate are ready to meet them in the Senate chamber to attend the opening and counting the vote for President and Vice President of the United States as the Constitution provides.

The two Houses having accordingly assembled, the certificates of the Electors of the fifteen States in the Union, which came by express, were by the Vice President opened, read, and delivered to the tellers appointed for the purpose, who, having examined and ascertained the votes, presented a list of them to the Vice President, which list was read to the two Houses, and is as follows:

STATES.	George Washington.	John Adams.	George Clinton.	Thomas Jefferson.	Aaron Burr.
New Hampshire.....	6	6	...	...	...
Massachusetts	16	16	...	...	...
Rhode Island.....	4	4	...	...	...
Connecticut.....	9	9	...	...	...
Vermont.....	3	3	...	...	...
New York.....	12	...	12	...	...
New Jersey.....	7	7	...	...	...
Pennsylvania.....	15	14	1	...	...
Delaware.....	3	3	...	...	...
Maryland	8	8	...	...	...
Virginia.....	21	...	21	...	...
Kentucky	4	...	...	4	...
North Carolina.....	12	...	12	...	...
South Carolina.....	8	7	...	...	1
Georgia.....	4	...	4	...	...
Total.....	132	77	50	4	1

House, February 13.

Resolved, That the Speaker attended by the House do now withdraw to the Senate chamber for the purpose expressed in the said message.

The Speaker accordingly left the chair, and attended by the House withdrew to the Senate chamber, and after some time returned to the House.

The Speaker resumed the chair. Mr. William Smith and Mr. Lawrence then delivered in, at the clerk's table, a list of the votes of the Electors of the several States in the choice of a President and Vice President of the United States as the same were declared by the President of the Senate, in the presence of the Senate and of this House; which was ordered to be entered on the journal.

1797.

[The resolution of 1793 was adopted.]

Senate, February 8.

A message from the House of Representatives informed the Senate that they are ready to meet the Senate in the chamber of that House, agreeably to the report of the joint committee, to attend the opening and examining the votes of the Electors for President and Vice President of the United States, as the Constitution provides.

House, February 8.

The President and members of the Senate soon after entered and took their seats, when the President of the Senate (Mr. Adams) thus addressed the two Houses :

" Gentlemen of the Senate and of the House of Representatives : The purpose for which we are assembled is expressed in the following resolutions. (Mr. Adams here read the resolutions which had been adopted by the two Houses relative to the subject.) I have received packets containing the certificates of the votes of the Electors for a President and Vice President of the United States from all the sixteen States of the Union. I have also received duplicates of the returns by post from fifteen of the States. No duplicate from the State of Kentucky is yet come to hand.

" It has been the practice heretofore, on similar occasions, to begin with the returns from the State at one end of the United States and to proceed to the other; I shall therefore do the same at this time."

Mr. Adams then took the packet from the State of Tennessee, and after having read the superscription, broke the seal and read the certificate of the election of the Electors. He then gave it to the clerk of the Senate, requesting him to read the report of the Electors, which he accordingly did. All the papers were then handed to the tellers, viz., Mr. Sedgwick, on the part of the Senate, and Messrs. Sitgreaves and Parker, on the part of the House of Representatives; and when they had noted the contents, the President of the Senate proceeded with the other States in the following order: . . .

All the returns having been gone through, Mr. Sedgwick reported that, according to order, the tellers appointed by the two Houses had performed the business assigned them, and reported the result to be as above stated.

The President of the Senate then thus addressed the two Houses: " Gentlemen of the Senate and of the House of Representatives : The whole number of votes are 188; 70 votes, therefore, make a majority; so that the person who has 71 votes, which is the highest number, is elected President, and the person who has 68 votes, which is the next highest number, is elected Vice President."

The President of the Senate then sat down for a moment, and rising again, thus addressed the two Houses: " In obedience to the Constitution and law of the United States, and to the commands of both Houses of Congress, expressed in their resolution passed in the present session, I declare that, John Adams is elected President of the United States, for four years, to commence with the fourth day of March next, and that, Thomas Jefferson is elected Vice President of the United States, for four years, to commence with the fourth day of March next."

NOTIFICATION CERTIFICATE.

Resolved (by Congress), That the President of the United States be requested to cause to be transmitted to Thomas Jefferson, Esq., of Virginia, Vice President-elect of the United States, notification of his election to that office; and that the President of the Senate do make out and sign a certificate in the words following:

"Be it known, that the Senate and House of Representatives of the United States of America, being convened in the city of Philadelphia, on the second Wednesday of February, in the year of our Lord one thousand seven hundred and ninety-seven, the underwritten Vice President of the United States and President of the Senate did, in the presence of the said Senate and House of Representatives, open all the certificates and count all the votes of the Electors for a President and for a Vice President; by which it appears that Thomas Jefferson, Esq., was duly elected, agreeably to the Constitution, Vice President of the United States of America. In witness whereof, I have hereunto set my hand and seal, this 10th day of February, 1797."

1801.

[Resolution as before with this addition,—“and if it shall appear that a choice has been made agreeably to the Constitution, such entry on the journals shall be deemed a sufficient declaration thereof.”]

Senate, February 9.

Resolved, That the Senate will be ready to receive the House of Representatives in the Senate chamber on Wednesday next, at 12 o'clock, for the purpose of being present at the opening and counting of the votes.

Senate, February 11.

The two Houses of Congress accordingly assembled in the Senate chamber, and the certificates of the Electors of sixteen States were, by the Vice President, opened and delivered to the tellers appointed for the purpose, who, having examined and ascertained the number of votes, presented a list thereof to the Vice President, which was read, as follows: . . .

House, February 11.

The President of the Senate, in the presence of both Houses, proceeded to open the certificates of the Electors of the several States, beginning with the State of New Hampshire; and as the votes were read the tellers on the part of each House counted and took lists of the same, which, being compared, were delivered to the President of the Senate, and are as follows: . . .

[A Notification Certificate was made as in 1797.]

1805.

[The concurrent resolution was not adopted.]

Senate, February 12.

Resolved, That the Senate will be ready to receive the House of Representatives in the Senate chamber, on Wednesday, the 18th instant, February, at noon, for the purpose of being present at the opening and counting of the votes.

Senate, February 13.

The President (Mr. Burr) stated that, pursuant to law, there had been transmitted to him several packets, which, from the indorsement upon them, appeared to be the votes of the Electors of a President and Vice President; that the returns forwarded by mail, as well as the duplicates sent by special messengers, had been received by him in due time. "You will now proceed, gentlemen," said he, "to count the votes as the Constitution and laws direct;" adding that, perceiving no cause for preference in the order of opening the returns, he would pursue a geographical arrangement, beginning with the Northern States. The President then proceeded to break the seals of the respective returns, handing each return and its accompanying duplicate, as the seals were broken, to the tellers, through the secretary; Mr. S. Smith reading aloud the returns and the attestations of the appointment of the Electors, and Mr. J. Clay and Mr. R. Griswold comparing them with the duplicate return lying before them. . . .

After the returns had been all examined, without any objection having been made to receiving any of the votes, Mr. S. Smith, on behalf of the tellers, communicated to the President the foregoing result, which was read from the chair.

NOTES APPENDED.—In this return (Rhode Island), after stating the whole number of votes given for Thomas Jefferson and George Clinton, each Elector certifies distinctly his vote for Thomas Jefferson as President, and for George Clinton, as Vice President.

This return (Georgia) certifies the votes to have been given as stated, in an inclosed paper.

In this return (Ohio) the votes are not certified to have been given by ballot, but agreeably to law.

House, February 13.

Resolved, That this House will attend in the chamber of the Senate this day, at twelve o'clock, noon, for the purpose of being present at the opening and counting of the votes.

The President of the Senate, in the presence of both Houses, proceeded to open the certificates of the Electors of the several States, beginning with the State of New Hampshire; and, as the votes were read, the tellers

on the part of each House counted, and took lists of the same; which being compared were delivered to the President of the Senate, and are shown in the preceding table. The President of the Senate, in pursuance of the duty enjoined upon him, announced the state of the votes to both Houses.

[The Notification Certificate of 1797 was used.]

1809.

[The resolution of 1793 was adopted.]

House, February 8.

The President of the Senate opened the electoral returns, one copy of which was handed to the teller of the Senate, Mr. S. Smith, who read it; the tellers of the House, Messrs. Nicholas and Van Dyke, comparing the duplicate returns handed to them.

Mr. Hillhouse observed that the returns from one of the States appeared to be defective, the Governor's certificate not being attached.

NOTE APPENDED.—One of the votes of Kentucky lost from the non-attendance of one of the Electors.

[A Notification Certificate as in 1797 was sent.]

1813.

[The resolution of 1793 was adopted.]

House, February 10.

The President of the Senate then proceeded to open and hand to the tellers the sealed returns from each State, which were severally read aloud by one of the tellers, and noted down and announced by the secretaries of each House.

[The Notification Certificate of 1797 was again used.]

1817.

[The resolution of 1793 was adopted.]

Senate, February 12.

A message from the House of Representatives informed the Senate that the House is now ready to attend the Senate, and proceed in opening the certificates and counting the votes of the Electors of the several States for a President and Vice President of the United States, in pursuance of the resolution of the two Houses of Congress.

The certificates of the Electors of the several States were, by the President of the Senate, opened and delivered to the tellers appointed for the purpose, who, having examined and ascertained the number of votes, presented a list thereof to the President of the Senate, which was read as follows. . . .

House, February 12.

On motion of Mr. Jackson, a message was sent to the Senate, informing them that the House of Representatives were ready to proceed, agreeably to the mutual resolution of yesterday, to open and count the votes for President and Vice President of the United States.

The Senate, soon after, entered the House of Representatives, preceded by their President, the seals of the votes were broken by the President of the Senate, and by him handed to the tellers, by whom they were read aloud; the votes of all the States having been read, with the exception of those of the State of Indiana,—

Mr. Taylor, of New York, arose, and (addressing himself to the Speaker of the House) expressed his unfeigned regret at being compelled, by his sense of duty, to interrupt the proceeding of the two Houses.

Mr. Taylor was then going on to state his reasons for objecting to the votes from Indiana being read and recorded, when the Speaker interrupted him, and said the two Houses had met for the purpose—the single specific purpose—of performing the constitutional duty which they were then discharging, and that while so acting, in joint meeting, they could consider no proposition nor perform any business not prescribed by the Constitution.

Mr. Varnum, of the Senate (addressing the President of the Senate), moved that the Senate withdraw to their chamber. The motion was seconded by Mr. Dana, of the Senate, and the question being put by the President to the members of the Senate, it was agreed to, and the Senate withdrew accordingly.

[Debate followed in both Houses, with no definite result in either, and in a short time they resumed their business and the count was finished.

The Notification Certificate of 1797 was used.]

1821.

[The resolution of 1793 was adopted.]

House, February 4.

Mr. Clay, from the joint committee, to whom the subject had been referred, reported the following resolution:

Resolved, That if any objection be made to the votes of Missouri, and the counting or omitting to count which shall not essentially change the result of the election, in that case they shall be reported by the President of the Senate in the following manner:

Were the votes of Missouri to be counted, the result would be for A. B. for President of the United States, —— votes; if not counted for A. B. as President of the United States, —— votes; but in either event A. B. is elected President of the United States; and in the same manner for Vice President.

[The resolution was debated and finally passed by both Houses, and Henry Clay made the following remarks:]

Mr. Clay said he would merely observe that the difficulty is before us; that we must decide it when the two Houses meet, or avoid it by some previous arrangement. The committee being morally certain that the question would arise on the votes in joint meeting, thought it best, as he had before stated, to give it the go-by in this way. Suppose this resolution not adopted, the President of the Senate will proceed to open and count the votes; and would the House allow that officer, singly and alone, thus virtually to decide the question of the legality of the votes? If not, how then were they to proceed? Was it to be settled by the decision of the two Houses conjointly, or of the two Houses separately? One House would say the votes ought to be counted, the other that they ought not; and then the votes would be lost altogether. In fact, Mr. Clay said, there was no mode pointed out in the Constitution of settling litigated questions arising in the discharge of this subject; it was a *casus omissus*; and he thought it would be proper either by some act of derivative legislation, or by an amendment of the Constitution itself, to supply the defect.

Senate, February 14.

The certificates of the Electors of the several States, beginning with the State of New Hampshire, were, by the President of the Senate, opened, and delivered to tellers appointed for the purpose, by whom they were read, except the State of Missouri; and, when the certificate of the Electors of that State was opened, an objection was made by Mr. Livermore, a member of the House of Representatives from the State of New Hampshire, to counting said votes.

Whereupon, on motion, by Mr. Williams, of Tennessee, the Senate returned to their own chamber.

[The Senate did not debate the mooted question after withdrawing. The House discussed it vigorously, but entirely on the point of their individual and separate right of accepting or rejecting votes, with or against the will of the Senate. It was admitted that the two Houses, jointly met, had no powers, and agreed that in their separate capacities they were powerless; yet it was held that Congress had the right to decide on the fact of the admission of a State to the Union. The authority of the President of the Senate to open and count the votes was assented to universally, and only his right to decide on the *status* of Missouri objected to. "Does it not follow that the votes are to be counted in the presence of the two Houses?" asked Mr. Archer, on the one side; and on the other Mr. Randolph said, "Your office, in regard to the electoral votes, is merely ministerial; it is to count the votes, and you undertake to reject votes."

The motion made in the House, that Missouri was a State and therefore

her votes "ought to be counted," was indefinitely postponed, and the Senate returned to the hall of the House.]

The President of the Senate then, in pursuance of the resolution adopted by the two Houses, proceeded to announce the state of the votes to the two Houses of Congress, in joint meeting assembled, as follows: "Were the votes of Missouri to be counted, the result would be, For James Monroe, of Virginia, for President of the United States, 281 votes; if not counted, for James Monroe, of Virginia, 228 votes," etc.

The President of the Senate had proceeded thus far, in the proclamation, when Mr. Floyd, of Virginia, addressed the Chair (the Speaker), and inquired whether the votes of Missouri were or were not counted.

Cries of "Order! order!" were so loud as to drown Mr. Floyd's voice.

The President of the Senate had hesitated in the proclamation, on Mr. Floyd addressing the Chair.

Mr. Randolph rose, and was addressing the Chair, when loud cries of "Order! order!" resounded from many voices. The Speaker pronounced Mr. Randolph to be out of order, and invited him to take his seat. Mr. Brush demanded that Mr. Randolph should be allowed to proceed, and declared his determination to sustain his right to do so. Mr. Brush was also loudly called to order. Mr. Floyd demanded of the Chair whether he was considered in order or not.

The Speaker determined that he was not in order at this time, the only business being, at that present time, that prescribed by the rule of this morning. There was considerable murmuring at this decision, but order was restored, when the President of the Senate concluded his annunciation.

[The Notification Certificate of 1797 was again used.]

1825.

Senate, February 8.

The committee reported the agreement of the joint committee to the following resolution:

Resolved, That the two Houses shall assemble in the chamber of the House of Representatives on Wednesday, the 9th day of February, 1825, at 12 o'clock; that one person be appointed teller on the part of the Senate, and two persons be appointed tellers on the part of the House, to make a list of the votes as they shall be declared; that the result shall be delivered to the President of the Senate, who shall announce to the two Houses assembled as aforesaid the state of the vote, and the person or persons elected, if it shall appear that a choice hath been made agreeably to the Constitution of the United States; which annunciation shall be deemed a sufficient declaration of the person or persons elected, and, together with a list of the votes, shall be entered on the journals of the two Houses.

Mr. Talbot suggested some difficulty in the order of proceeding recom-

mended by the committee; and Mr. Holmes, of Maine, proposed some amendment, but which he subsequently withdrew. These suggestions gave rise to some discussion on the subject.

Mr. Tazewell went, at some length, into an explanation and justification of the course adopted by the committee. In some points, in which the committee on the part of the Senate would have preferred a different arrangement, they were overruled by the committee on the part of the other House, which had its rights as well as the Senate. The mode reported by the committee was precisely, however, the same as that adopted by the Senate, and agreed on by the two Houses, on similar occasions, from the year 1805 to 1817, inclusive.

House, February 9.

The President of the Senate (Mr. Garland) then rose, and stated that the certificates, forwarded by the Electors from each State, would be delivered to the tellers.

The President of the Senate then opened two packets, one received by messenger, and the other by mail, containing the certificates of the votes of the State of New Hampshire. One of these was then read by Mr. Tazewell, while the other was compared with it by Messrs. Taylor and Barbour.

The tellers then left the clerk's table, and presenting themselves in front of the Speaker, Mr. Tazewell delivered their report of the votes given, which was then handed to the President of the Senate, who again read it to the two Houses, as follows: . . .

[The Notification Certificate was again used, and for the last time, in advising the Vice President-elect.]

1829.

[The resolution of 1825 was adopted.]

House, February 11.

The Vice President then, having before him the packets received, proceeded to break the seals and then handed over the packets to the tellers, who opened and read them at length. The same process was repeated, until all the packets had been opened and read, when Mr. Tazewell, retiring to some distance from the Chair, read the following report: . . .

1833.

[The resolution of 1825 was adopted.]

House, February 13.

The President of the Senate taking the chair of the House, and in the presence of the two Houses, proceeded to open the votes of the Electors in the several States for President and Vice President of the United States.

Messrs. Grundy, of the Senate, and Dayton and Hubbard, of the House of Representatives, acted as a committee to read and enumerate the votes.

1837.

[The resolution of 1825 was adopted with the addition of making the President of the Senate "the presiding officer."]

House, February 6.

[A committee, appointed to investigate the alleged appointment of "ineligible Electors," reported in part as follows:]

"The committee have not ascertained whether the Electors are the same individuals who held, or are presumed to have held, the offices of deputy postmasters at the time when the appointment of Electors was made; and this is the less to be regretted, as it is confidently believed that no change in the result of the election of either the President or Vice President would be effected by the ascertainment of the fact in either way, as five or six votes only would in any event be abstracted from the whole number; for the committee cannot adopt the opinion entertained by some, that a single illegal vote would vitiate the whole electoral vote of the college of Electors in which it was given, particularly in cases where the vote of the whole college has been given for the same persons.

"The committee are of opinion that the second section of the second article of the Constitution, which declares that 'no Senator, or Representative, or person holding an office of trust or profit under the United States, shall be appointed an Elector,' ought to be carried in its whole spirit into rigid execution, in order to prevent officers of the General Government from bringing their official power to influence the elections of President and Vice President of the United States. This provision of the Constitution, it is believed, excludes and disqualifies deputy postmasters from the appointment of Electors; and the disqualification relates to the time of the appointments; and that a resignation of the office of deputy postmaster, after his appointment as Elector, would not entitle him to vote as Elector under the Constitution.

"Should a case occur in which it became necessary to ascertain and determine upon the qualifications of Electors of President and Vice President of the United States, the important question would be presented, What tribunal would, under the Constitution, be competent to decide? Whether the respective colleges of Electors in the different States should decide upon the qualifications of their own members, or Congress should exercise the power, is a question which the committee are of opinion ought to be settled by a permanent provision upon the subject."

[A resolution similar to that in the Missouri case was adopted to anticipate the opening of the votes of Michigan, which was admitted January 26, 1837.]



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House, February 8.

The President of the Senate then rose and said:

"The two Houses being now convened for the purpose of counting the electoral votes of the several States for President and Vice President of the United States, the President of the Senate will, in pursuance of the provisions of the Constitution, proceed to open the votes and deliver them to the tellers, in order that they may be counted."

The tellers then counted the votes, and announced them severally in their order, also reading the qualifications of the Electors and the certificates of their elections. He then announced the result, as reported by the tellers, as follows: . . .

"It therefore appears (continued the President) that were the votes of Michigan to be counted the result would be, for Martin Van Buren for President of the United States, 170 votes; if the votes of Michigan be not counted, Martin Van Buren then has 167 votes. In either event, Martin Van Buren, of New York, is elected President of the United States."

1841.

[The resolution of 1837 was adopted.]

House, February 10.

The Vice President of the United States, in presence of the two Houses of Congress, proceeded to open the certificates of the Electors of President and Vice President of the United States, beginning with those of the State of Maine, and ending with the State of Michigan; and the tellers having read, counted, and registered the same, making duplicate lists thereof, and the lists being compared, they were delivered to the Vice President of the United States, and are as follows: . . .

1845.

[The resolution of 1825 was adopted.]

House, February 12.

The President of the Senate rose when the members of the House and the Senators were all seated, and stated the object of their thus assembling to be to count the votes cast by the Electors, and handing to Mr. Walker (one of the tellers) a sealed packet, he said: "I deliver to the gentlemen tellers the votes of the Electors of the State of Maine for President and Vice President of the United States, in order that they may be counted." Mr. Walker received the packet; and having broken the seals, the tellers examined the votes, which were announced.

1849.

[The resolution of 1837 was adopted.]

House, February 14.

The VICE PRESIDENT then rose and said:

"In obedience to law, the Senate and House of Representatives have assembled, on the present occasion, so that I may fulfil the duty enjoined upon me by the Constitution, by opening, in their presence, the sealed certificates of the lists of persons voted for, by the Electors in the respective States, as President and Vice President, cause the votes to be counted, and have the persons to fill those offices ascertained and declared agreeably to the Constitution."

The VICE PRESIDENT then opened the certificate of the Electors of the State of Maine, and said: "I now open and present to the tellers chosen by the two Houses the certificates transmitted by the Electors of the State of Maine, that the votes therein recorded may be counted."

Mr. JEFFERSON DAVIS proceeded to read the certificate, and the vote reported was registered by the tellers in duplicate lists.

1853.

[The resolution of 1837 was adopted.]

House, February 9.

[The record of the proceedings on this occasion is copied *verbatim* from that of 1849, with the exception of the names and votes.]

1857.

[The resolution of 1837 was adopted.]

House, February 11.

Mr. MASON, the President of the Senate, took his seat on the right of the Speaker of the House of Representatives, and presided over the two Houses.

The PRESIDING OFFICER. Pursuant to law, and in obedience to the concurrent order of the two Houses, the President of the Senate will now proceed to open and count the votes which have been given for President and Vice President of the United States, for the term prescribed by the Constitution, to commence on the 4th day of March, 1857.

The PRESIDING OFFICER thereupon proceeded to open and hand to the tellers the votes of the several States for President and Vice President of the United States.

It appeared from the certificate of the Electors of the State of Wisconsin that the electoral vote of that State had not been cast on the day prescribed by law.

Mr. LETCHER. If I understand the vote which has just been read, it

has not been cast on the day prescribed by law for voting for President and Vice President of the United States. I do not know what would be proper in a case of this sort; but I desire now to call attention to it. A time may come when it would be a matter of importance to have these votes in regular shape.

The PRESIDING OFFICER. The presiding officer considers that debate is not in order while the tellers are counting the votes.

Mr. JONES (one of the tellers). I suppose, Mr. President, the proper way would be for the tellers to report the facts to the convention of the two Houses, and let them decide.

The PRESIDING OFFICER. The presiding officer so considers.

Mr. SMITH. Would it be in order now to move that the vote of the State of Wisconsin be received?

The PRESIDING OFFICER. It would not be in order.

The Count of the votes having been concluded—

Mr. JONES, one of the tellers, reported. [His report is a detailed statement of the election, such as the President of the Senate was required to make by the law of 1792.]

Mr. LETCHER. Is it in order now to move to exclude the vote of Wisconsin from that count?

The PRESIDING OFFICER. No debate is in order, in the opinion of the presiding officer.

Senator CRITTENDEN. Do I understand the Chair to decide that Congress, in no form, has power to decide upon the validity or invalidity of a vote?

The PRESIDING OFFICER. The presiding officer has made no such decision, he will inform the Senator from Kentucky. In pursuance of the order of the two Houses, the presiding officer will now announce the vote. . . .

Mr. H. MARSHALL. Mr. President, I think that it is a matter of public importance, not for this occasion, but for some occasion which may arise hereafter, that the ruling of the Chair upon this occasion should be publicly excepted to. The language of the Constitution is, that "the President of the Senate, in the presence of the House of Representatives, shall open all the certificates;" and then the phraseology changes, and proceeds, "and the votes shall be counted," not by you, but by us.

Mr. SMITH, of Tennessee. I rise to a question of order. Is debate in order?

The PRESIDING OFFICER. The presiding officer would state that, the votes having been counted and announced, the functions of the two Houses, assembled for the purpose of counting the votes, are discharged.

Senator TOOMBS. I except to that decision of the Chair, and appeal from that judgment. I wish to enter my dissent from that decision, that it may not be hereafter drawn into a precedent.

Senator BIGLER. I am instructed by the tellers to state to the President and the convention that they have not yet signed this certificate, and that they have determined to sign it only when it sets forth all the facts.

The PRESIDING OFFICER. The presiding officer is informed by the tellers that they have not yet made out their certificate. [Laughter.]

Senator DOUGLAS. I rise to protest against this joint convention being dissolved until the question which has been raised shall have been decided. I am willing that the Senate shall retire to its own chamber, to consider and determine the question in dispute; but I do protest solemnly against the deed being done before we have had an opportunity of deciding this question.

[During this while and for some time after a rambling debate was kept up, which was finally ended by the withdrawal of the Senate.]

THE DEBATE.

[In the House the position of one faction may be fairly gathered from the utterly untenable and disjointed declarations of Humphrey Marshall, as follows:]

The Constitution provides that, when the votes are "*then counted*," if it shall appear that a candidate has the majority, he shall be President. The *law* of 1792 says, on the second Wednesday in February the certificates shall be opened, the votes counted, and the persons who are to fill the offices of President and Vice President *shall be ascertained and declared agreeably to the Constitution*. Ascertained by whom, sir?—declared by whom, sir? Is the President of the Senate to ascertain it—is he to declare it—agreeably to the Constitution? Or, are the Houses, in the presence of each other, to ascertain the fact; and are *they* to declare, through their respective organs, and in the presence of each other, who are the persons to fill these offices? Until the fact has been ascertained and declared by the sanction of the House, I say it has not been done "agreeably to the Constitution." Suppose, sir, that the House should not agree to the result as declared by the President of the Senate—not in this case, for here there is no doubt who is elected, and we are only trying to determine what is proper, and to do that properly—suppose that the result depended on this vote of Wisconsin, and that vote had been challenged, as it has been to-day; would you, or any other member of this House, say that vote could be counted and the result declared *without the concurrence of this House*? Or, would not the House of Representatives undertake, in such an event, to judge for itself whether the majority had been cast—whether the vote had been counted agreeably to the Constitution—and whether it would or would not, in pursuance of a duty devolved on it by the Constitution, proceed to elect a President of the United States agreeably to the constitutional requisition, in the event of a failure

of any one to have a majority? *The House holds in its own hands the means of protecting its own dignity, and of preserving the substantial requisitions of the Constitution, by seeing that the votes are properly counted.**

[The position of another faction may be gathered from the following passage:]

The SPEAKER. The gentleman from Virginia rises to a question of order.

Mr. MILLSON. My point of order is this: The resolution assumes that the Senate is to return in joint convention, when I hold that they may never, and need never, return, the work having been accomplished. The second point is, that the Constitution is a body of rules for the government of this House, as well as those enacted by ourselves, and under the Constitution the Senate and the House of Representatives have never been, and can never be, in joint convention. The third point is, that the resolution assumes the right of the House to reject the vote of a State given for President and Vice President, when no such authority has been given by the Constitution either to the Senate or to the House of Representatives, and when I think the power has been wisely withheld from both to determine any such question.

[In the Senate opinions were equally at variance, as the following extracts will show.]

Mr. BIGLER. Before delivering the report of the tellers to the secretary, I wish to allude to the difficulty which occurred in convention.

Mr. SEWARD. Will the honorable Senator allow me to interrupt him? I think he used the word "convention." I think it is not found in the Constitution, nor in any law of the United States.

Mr. HUNTER. The Senator from Pennsylvania will allow me to make a suggestion. This whole matter is new; no difficulty of this sort ever occurred before when the two Houses were sitting together. I move that the committee which has been heretofore appointed by the Chair on this subject be instructed to confer with the committee on the part of the House of Representatives in regard to the report they shall make.

Mr. NOURSE. I wish to suggest to the gentleman from Virginia a difficulty, in my mind, to see if he can obviate it. If the convention, so to call it, of the two Houses is not to decide whether the vote of a certain State is to be counted or not, who is to decide it? It must be decided by somebody; and if the two Houses separate and do not agree, what is to be the result, and what is to come of it? If the convention assembled have a right to settle the question they can settle it undoubtedly; but, if

* Mr. Marshall evidently never suspected the possibility of such happenings as the memorable ones of 1877.

it depends on the concurrent action of the two Houses, why may not a result be defeated altogether?

Mr. BUTLER. I feel a little concerned about this question, I confess, as one of those who think the States ought to maintain their relative influence under the Constitution as States, and the Representatives as Representatives. Now, sir, I dispute the right, out and out, of ascertaining who is elected President, and who is not elected President, except by the rule of addition. Mind—I wish to be as emphatic as I can on this subject—if this convention, as it is called, in which the Senate is a part only, can assume the jurisdiction of saying how votes shall be counted (and that is what they have assumed to do in some measure), I presume they can make a President of the United States without an election, by simply saying what votes shall be counted, and what not counted. That is my opinion.

Mr. STUART. It seems to me that what was said in the hall of the House of Representatives in respect to the tellers signing the statement is entirely superfluous. As a matter of form, it may be very well, but it is a matter of form without substance. There is nothing in the law, nothing in the Constitution, that requires it. I submit that whenever this matter is examined—and I submit it now only as a question having some relation to this subject—one of two things will be ascertained: either the presiding officer is bound to count all the votes that are certified to him by the State authorities, or else the presiding officer, under the present law, and he alone, has a right to decide whether he will count or reject them. In my humble judgment that is the construction of the Constitution and law as they now stand.

Mr. TOOMBS. The circumstances of the case necessarily involve the right and the duty of the two branches of the Legislature, the Senate and the House of Representatives, to determine what are the votes to be counted; and the President of the Senate can only announce those to be votes which are thus decided by competent authority; and any attempt on the part of the presiding officer to declare what votes he may deem to be legal, or to decide what are the votes, no matter whether it affects the result or not, or even to say the question shall not be decided, however highly I respect the Chair, I submit is not a power given to the presiding officer by the Constitution and the laws.

Mr. STUART. But, sir, the Constitution has devolved upon the presiding officer the duty of receiving these votes, of keeping them, of opening them in the presence of the two Houses, of counting them, and declaring the result. What votes he shall count it is entirely competent for Congress by law to declare.

Mr. DOUGLAS. On looking into the law and the Constitution since we have returned to our chamber, I have arrived at the conclusion that all has been done that the law requires to be done to make the action

complete. We assembled in the hall of the House of Representatives in pursuance of the law. The law has been complied with in all things. The fact that the tellers have not made a report is of no consequence, for the reason that the law does not provide for tellers. Then, sir, there is one point of irregularity, in my opinion, to which it is well for us to turn our attention on this occasion. In my opinion, Wisconsin ought not to have been entered on the tellers' list, for this simple reason: that the two Houses assembled to hear announced the votes of all the States of this Union which assembled, by their Electors, on the 3d day of December last, and cast their votes for President and Vice President of the United States. You had no right to receive any vote, or any return, except of an election on the 3d day of December last, for that was the day appointed by law.

Mr. COLLAMER. In my estimation, the moment the tellers came to a certificate irregular on its face, stating that the votes were cast on a day differing from that prescribed by law, they should have stopped there, and announced the fact to the Chair, and the Chair should immediately have stated that condition of things, and the two Houses should have separated to make provision in relation to the manner of settling it. In these remarks, I am proceeding entirely on the ground that there was no previous preparation as to the manner of settling these questions, which, I think, should have been provided for by law long ago.

Mr. HALE. It is fortunate for us that this election is decided irrespective of this vote; but there is a principle here which I am not willing to see trampled down; and I am not willing to submit to have it conceded away, as it has been by almost every one who has spoken, except my honorable friend from New York [Mr. SEWARD]; and even he seems to approach it so timidly as not to have formed an opinion on it. Sir, I was born with an opinion on that question, and I have always entertained it. I say, this occasion will not be useless if it suggests the form of a law which shall prescribe the manner in which this subject shall be regulated. I think there is, and has been for a long time, a necessity for such a law.

[The debate in both Houses lasted several days, with the result of deciding nothing as to their powers in the premises, and with a very strong leaning towards the opinion that it was the duty of the President of the Senate to canvass the votes according to the laws of the land.]

1861.

[The resolution of 1837 was adopted.]

House, February 13.

The VICE PRESIDENT then said: "The two Houses being assembled, in pursuance of the Constitution, that the votes may be counted and

declared for President and Vice President of the United States for the term commencing on the 4th of March, 1861, it becomes my duty, under the Constitution, to open the certificates of election in the presence of the two Houses of Congress. I now proceed to discharge that duty."

The VICE PRESIDENT then proceeded to open and hand to the tellers the votes of the several States for President and Vice President of the United States, commencing with the State of Maine.

Senate, February 13.

Mr. TRUMBULL. The committee of the two Houses, appointed to devise a mode for canvassing the votes for President and Vice President of the United States, and for notifying the persons elected of their election, have instructed me to make the following report: . . .

1865.

[The 22d Joint Rule was adopted.*]

House, February 8.

The VICE PRESIDENT. The Senate and House of Representatives having met under the provisions of the Constitution for the purpose of opening, determining, and declaring the votes for the offices of President and Vice President of the United States for the term of four years commencing on the fourth of March next, and it being my duty, in the presence of both Houses thus convened, to open the votes, I now proceed to discharge that duty.

The VICE PRESIDENT then proceeded to open and hand to the tellers the votes of the several States for President and Vice President of the United States, commencing with the State of Maine.

[The presiding officer stated that one vote from Nevada was wanting.]

Senator COWAN said: Mr. President, I inquire whether there are any further returns to be counted?

The VICE PRESIDENT. There are not.

Senator COWAN. And if there be, I would inquire why they are not submitted to this body in joint convention, which is alone capable of determining whether they should be counted or not.

The VICE PRESIDENT. The Chair has in his possession returns from the States of Louisiana and Tennessee, but in obedience to the law of the land, the Chair holds it to be his duty not to present them to the Convention.†

* *Vide page 381.*

† This refers to the Act of 1865, under which the votes of Louisiana and Tennessee were rejected. *Vide page 380.*

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Senator COWAN. I ask whether the joint resolution on that subject has become a law, by having received the approval of the President of the United States?

The VICE PRESIDENT. The Chair believes that the official communication of its approval by the President has not been received by either House. The Chair, however, has been apprised of the fact that the joint resolution has received the approval of the President.

[A short debate ensued, caused by the confusion of powers consequent upon the existence of two rules applying to the case,—the 22d Joint Rule and the Act of 1865. Ultimately the President of the Senate decided the question under the Act of Congress, and the count was concluded in peace.]

1869.

[The 22d Joint Rule was again in force.]

[A concurrent resolution, similar to that adopted in 1821 in the Missouri case, was passed in anticipation of the presentation of votes from Georgia, on the ground that she was not yet reorganized under the Reconstruction Act of July 20, 1868.]

House, February 10.

The **PRESIDENT pro tempore** of the Senate. The Senate and House of Representatives having met under the Constitution for the purpose of opening, determining, and declaring the votes for the offices of President and Vice President of the United States for the term of four years commencing on the 4th of March next, and it being my duty, in the presence of both Houses thus convened, to open the votes, I now proceed to discharge that duty.

The **PRESIDENT pro tempore** then proceeded to open and hand to the tellers the votes of the several States for President and Vice President of the United States, commencing with the State of New Hampshire. . . .

The same form was observed in announcing the votes of the other States until the State of Louisiana was announced, when—

Mr. MULLIN said: I object to any count of the votes certified from the State of Louisiana, and raise the question in regard to them that no valid election of Electors for President and Vice President of the United States has been held in said State.

The PRESIDENT. Objection being made to the counting of the votes returned from the State of Louisiana the Senate will, according to the Rule, retire to their chamber to deliberate upon the objection.

At a quarter past two o'clock, P.M., the Senate in a body re-entered the hall, and—

The PRESIDENT, having resumed the chair, said: "By a concurrent

resolution of the two Houses the vote of Louisiana is ordered to be counted."

The tellers accordingly proceeded to announce the vote of the State of Louisiana, and of the remaining States until the State of Georgia was reached.

Mr. BUTLER said: I object, under the joint rule, that the vote of the State of Georgia for President and Vice President ought not to be counted, and object to the counting thereof because, among other things, the vote of the Electors in the Electoral College was not given on the first Wednesday of December, as required by law, and no excuse or justification for the omission of such legal duty is set forth in the certificate of the action of the Electors.

Secondly. Because at the date of the election of said Electors the State of Georgia had not been admitted to representation as a State in Congress since the rebellion of her people, or become entitled thereto.

Thirdly. That at said date said State of Georgia had not fulfilled in due form all the requirements of the Constitution and laws of the United States, known as the Reconstruction Acts, so as to entitle said State of Georgia to be represented as a State in the Union in the electoral vote of the several States in the choice of President and Vice President.

Fourthly. That the election pretended to have been held in the State of Georgia on the first Tuesday of November last past was not a free, just, equal and fair election; but the people of the State were deprived of their just rights therein by force and fraud.

The PRESIDENT. The concurrent resolution of the two Houses will be read on the subject.

Senator DRAKE. As this objection requires the retirement of the Senate, I send up an objection to counting the vote of Nevada, to be considered at the same time

Mr. PRUYN (one of the tellers) read the following as the reason for the objection of Senator DRAKE: I object to the counting of the votes of the Electors of the State of Nevada, because it does not appear that they voted by ballot.

The PRESIDENT. It comes too late. The concurrent resolution of the two Houses in relation to the electoral vote of Georgia will now be read.

Senator EDMUNDS. I rise to a point of order. The objection of the gentleman from Massachusetts is not in order, the two Houses having, by special rule for this case, made a substantial change in the standing joint rule.

Mr. BUTLER, of Massachusetts. I desire to call the attention of the President to the law that the votes must be counted or rejected by the convention of the two Houses, and that the prior concurrent action of the Senate and the House cannot bind the convention, but the convention may act after they get together as they choose to do.

The PRESIDENT. Objection being made, the Senate will retire to their chamber to deliberate under the rules.

At half-past four o'clock the Senate in a body re-entered the hall, and The PRESIDENT, having resumed the chair, said : "The objections of the gentleman from Massachusetts are overruled by the Senate, and the result of the vote will be stated as it would stand were the vote of the State of Georgia counted, and as it would stand if the vote of that State were not counted, under the concurrent resolution of the two Houses."

Mr. BUTLER, of Massachusetts. I desire to state that the House sustained the objection of "the gentleman from Massachusetts." [Laughter.] I do not understand that we are to be overruled by the Senate in that way. [Laughter.]

[For the succeeding proceedings the reader is referred to Appleton's "Presidential Counts." It need only be stated that they were marked by disorder and confusion to an unprecedented extent, during which the dignity and decorum of the American Congress were disgracefully sacrificed.]

The PRESIDENT. The tellers will now declare the result.

Senator CONKLING (one of the tellers) then proceeded to declare the result amid great noise and disorder, the President endeavoring to maintain order by repeated raps of his gavel.

The uproar continuing,

The SPEAKER said : "The Speaker of the House appeals to members of the House to preserve order. The Sergeant-at-Arms of the House will arrest any member refusing to obey the order of the President of this convention."

[The proceedings were then concluded.]

1873.

[The 22d Joint Rule was in force.]

House, February 12.

The VICE PRESIDENT. The Senate and House of Representatives having met under the provisions of the Constitution for the purpose of opening, determining, and declaring the votes cast for President and Vice President of the United States for the term of four years, commencing on the 4th of March next, and it being my duty, in the presence of both Houses thus convened, to open the votes, I now proceed to discharge that duty.

The VICE PRESIDENT then proceeded to open and hand to the tellers the votes of the several States for President and Vice President of the United States, commencing with the State of Maine.

Senator SHERMAN (one of the tellers) read in full the certificate of the vote of the State of Maine.

Senator TRUMBULL. I think the Governor's certificate should be read as the evidence of the election of the Electors.

The VICE PRESIDENT. The tellers will report the certificate.

Senator SHERMAN (as one of the tellers) read the certificate of the Governor of Maine.

Senator TRUMBULL. I would inquire if that certificate bears the signature of the Executive of the State of Maine?

Senator SHERMAN. The signature of Sydney Perham, as Governor, is in the centre of the paper, under the great seal of the State.

When the State of Georgia was reached,

Mr. HOAR objects, the votes reported by the tellers as having been cast by the Electors of the State of Georgia for Horace Greeley, of New York, cannot legally be counted, because said Horace Greeley, for whom they appear to have been cast, was dead at the time said Electors assembled to cast their votes, and was not a person within the meaning of the Constitution, this being a historical fact of which the two Houses may take notice.

When the State of Mississippi was reached,

Mr. TRUMBULL objects to counting the votes cast for President and Vice President by the Electors in the State of Mississippi, for the reason it does not appear from the certificate of said Electors that they voted by ballot.

Mr. POTTER objects to one vote of the State of Mississippi, because the certificate declaring that J. J. Spellman was appointed an Elector in the stead of A. T. Morgan, absent, by the electoral college of that State, in accordance with the laws of that State, is not signed by the Governor of that State. And further that the certificate of the Secretary of State read does not certify anything of his own knowledge, but only states he has been so notified as he certifies.

The VICE PRESIDENT. Three questions having arisen in regard to the counting of the votes for President and Vice President, the Senate will now withdraw to their chamber.

At three o'clock and thirty-five minutes P.M. the Senate in a body re-entered the hall.

The VICE PRESIDENT (having resumed the chair). The Chair will read a part of the twenty-second rule:

"And no question shall be decided affirmatively, and no vote objected to shall be counted, except by the concurrent votes of the two Houses, which being obtained, the two Houses shall immediately reassemble, and the presiding officer shall then announce the decision of the question submitted."

Upon the first point raised by the Representative from Massachusetts, there is a non-concurrence of the two Houses.

On the question submitted by the Senator from Illinois, the votes of the two Houses are concurrent.

On the third point raised by the Representative from New York, there is a concurrence.

When the State of Texas was reached,

Mr. TRUMBULL objected to the vote of Texas, because there is no certificate by the Executive authority of that State that the persons who voted for President and Vice President were appointed as Electors of that State, as required by the Act of Congress.

Mr. DICKEY objected to the counting of the electoral vote of the State of Texas, because four Electors, less than a majority of those elected, undertook to fill the places of other four Electors, who had been elected and were absent.

The VICE PRESIDENT. These two objections to counting the vote of Texas having been made, the Senate will now withdraw to their chamber.

At five o'clock and five minutes P.M. the Senate in a body re-entered the hall.

The VICE PRESIDENT said: "The two Houses having concurred, the electoral vote of Texas, under the 22d Joint Rule, will be counted."

When the State of Arkansas was reached,

The VICE PRESIDENT. The Chair, in presenting the electoral vote of the State of Arkansas, states it was received by him by mail on the 11th of December, 1872, and by messenger at the Department of State, and, in the absence of the Vice President, by the President *pro tempore* of the Senate, on the 28th of December, 1872. On the 4th or 5th day of February, during the present month, a person, claiming to be the messenger commissioned to bring the electoral vote of the State of Arkansas, presented himself at the Vice President's room with a paper, not in the form of law, but addressed to him as President of the Senate, and stated to him what he alleged to be its contents, representing himself to be commissioned as messenger to bring the vote. The Vice President said he would open the paper, as it was addressed to him, but he would not receive it, even informally. After reading its contents he found that it did not in any respect comply with the requirements of the law on the subject. The papers presented on the 11th of December and the 28th of December are now submitted to the tellers.

Mr. RICE objected to counting the vote of the State of Arkansas, because the official returns of the election in said State, made according to the laws of said State, show that the persons certified to by the Secretary of State as elected were not elected as Electors for President and Vice President at the election held November 5, 1872; second, because the returns read by the tellers are not certified according to law.

When the State of Louisiana was reached,

The VICE PRESIDENT said: "From Louisiana there have been received two returns sent by mail, and two by messenger."

These returns were objected to.

Senator WEST. I object to the reception by the Senate and House of Representatives of the electoral vote of Louisiana as certified to by the Governor of that State, upon the ground that said certificate was not made in pursuance of law.

Mr. SHELDON. I also object to the counting of the votes cast for B. Gratz Brown of Missouri, for Vice President, for the reason that the certificate of the Governor showing them to have been chosen Electors is not signed by the person who was at that time assistant Secretary of State for the State of Louisiana; and for the further reason that at the time said certificate was executed there had not been made any count, canvass, or return of the votes cast by the people of Louisiana for Electors by any lawful authority; and the said certificate was made by the Governor without any authentic knowledge of the result of the election by the people of said State, which facts are fully established by the testimony taken by the Senate Committee on Privileges and Elections, and are stated in their report to the Senate.

Senator CARPENTER. I object to the counting of the votes given for U. S. Grant for President, and Henry Wilson for Vice President, by the Electors of Louisiana, because there is no proper return of votes cast by the Electors of the State of Louisiana, and because there is no State Government in said State which is republican in form, and because no canvass or counting of the votes cast for Electors in the State of Louisiana, at the election held in November last, had been made prior to the meeting of the Electors.

Mr. POTTER. I object to counting the electoral votes from the State of Louisiana as cast for Ulysses S. Grant for President and Henry Wilson for Vice President, for the reason that there is no certificate from the executive authority of that State, as required by the Act of Congress of 1792, certifying that the persons who cast such votes were appointed Electors of said State; but that on the contrary it appears by the certificate of the Governor of said State that the persons appointed Electors were not the persons who cast such votes for U. S. Grant and Henry Wilson, but were persons who cast their votes not for said Grant and Wilson, but for no person as President, and for B. Gratz Brown as Vice President.

Senator TRUMBULL. I object to the counting of the votes cast by the persons in the first certificate read (for Grant and Wilson), for the reason that their election is not certified to by the proper officers; that Bovee, who signed the certificate of their election, was not Secretary of State at the time of making said certificate, nor in possession of the office of Secretary of State nor of the seal of said State; and for the further reason

that the certificate of said Bovee is untrue in fact, as appears by the admissions of said Bovee before the Committee of the Senate.

Mr. STEVENSON. I object to counting the votes from the State of Louisiana, because it does not sufficiently appear that the Electors were elected according to law.

Senator BOREMAN. I object to counting any votes from the State of Louisiana, for reasons set forth in the report of the Committee on Privileges and Elections submitted to the Senate on the 10th instant, and printed as Report No. 417 of the 42d Congress, third session.

The VICE PRESIDENT. There have been seven objections made in regard to receiving the votes of Louisiana, some of them against receiving any vote from that State. Each House will proceed to consider the objections to receiving the votes of Arkansas and Louisiana.

At seven o'clock and forty-five minutes P.M. the Senate in a body re-entered the hall.

The VICE PRESIDENT having resumed the chair, said: "The objection made by the Senator from Arkansas to the counting of the electoral vote of that State as declared by the tellers, having been considered by the two Houses, and there being a non-concurrence of the two Houses on this question, the vote of Arkansas, in accordance with the provisions of the 22d Joint Rule, will not be counted.

"On the question of the Louisiana votes there is a concurrence of the Houses; and the electoral votes of Louisiana will not be counted."

1877.

[The Houses proceeded under the "Electoral Act," which was devised for this occasion only.*]

House, February 1.

The PRESIDENT of the Senate arose and said:

"The joint convention of the two Houses of Congress for counting the votes for President and Vice President will now come to order.

"In obedience to the Constitution, the Senate and House of Representatives have met to be present at the opening of the certificates, and the counting and declaring of the results of the electoral votes, for the offices of President and Vice President of the United States for the term of four years, commencing on the 4th day of March next.

"In compliance with the law, the President of the Senate will now proceed, in the presence of the two Houses, to open all the certificates of the several States, in their alphabetical order, beginning with the State of Alabama."

* *Vide page 383.*

Then the strong box in which the certificates were carried in by Mr. Bassett, the assistant doorkeeper of the Senate, having been placed on the desk before him, the President of the Senate opened it, and, taking from it the certificate from the State of Alabama, handed it to the tellers who were seated just below him. . . .

Mr. Stone having completed the reading of the duplicate certificate, the PRESIDING OFFICER said:

"Are there any objections to the certificates from the State of Alabama? (After a pause)—The Chair hears none. The votes of the State of Alabama will be counted. One of the tellers will announce the votes, so that there may be no mistake."

The result was announced by Mr. Cook, of Georgia. . . .

When Florida was reached, Mr. Stone, the teller, proceeded to read the certificate. The reading of the first certificate showed the four votes of Florida for Hayes and Wheeler. Then the presiding officer handed to the teller another certificate received from the same State, which, on being read by Mr. Stone, showed the four votes of Florida for Tilden and Hendricks. The former certificate was authenticated by the late Governor Stearns, the latter by Attorney-General Cocke. Then the presiding officer handed down to the tellers still another certificate from the State of Florida, received through a messenger on the 31st of January, and a corresponding one received by mail on the 30th of January.

The PRESIDING OFFICER asked whether there were objections to counting the vote of the State of Florida.

Mr. FIELD, of New York, rose and sent to the clerk's desk a written objection to the first certificate.

Further objections being called for, Senator SARGENT sent up to the clerk's desk three several sets of objections to the votes cast by the Democratic Electors, on the ground that the papers were not authenticated as required by the Constitution and laws.

Senator JONES, of Florida, made objection specially to Mr. Humphreys, as holding an office of trust and profit under the United States.

Mr. KASSON, of Iowa, made an additional objection to the third set of certificates, because they were not authenticated by a person who held the office of Governor at the time that the functions of the Electors were exercised.

The PRESIDING OFFICER. Are there further objections to the counting of the votes of the State of Florida? (After a pause)—If there be none the certificates and papers, together with other papers accompanying the same, as well as the objections presented, will now be transmitted to the Electoral College Commission for judgment and decision. The Senate will now withdraw to its chamber, so that the House may separately determine the objections.

THE COMMISSION.

JUSTICES.

Miller, Samuel F. (Rep.), Iowa.
Strong, William (Rep.), Pennsylvania.
Bradley, Joseph P. (Rep.), New Jersey.
Field, Stephen J. (Dem.), California.
Clifford, Nathan (Dem.), Maine.

SENATORS.

Edmunds, George F. (Rep.), Vermont.
Morton, Oliver P. (Rep.), Indiana.
Frelinghuysen, F. T. (Rep.), New Jersey.
Thurman, Allen G. (Dem.), Ohio.
Bayard, Thomas F. (Dem.), Delaware.

REPRESENTATIVES.

Hoar, George F. (Rep.), Massachusetts.
Garfield, James A. (Rep.), Ohio.
Payne, Henry B. (Dem.), Ohio.
Abbott, Josiah B. (Dem.), Massachusetts.
Hanton, Eppa (Dem.), Virginia.

February 10.

[When the two Houses were again met together, the decision of the Commission in the Florida case was read, as follows:]

ELECTORAL COMMISSION, }
WASHINGTON, D. C., Feb. 9, 1877. }

To THE PRESIDENT OF THE SENATE OF THE UNITED STATES, presiding in the meeting of the two Houses of Congress under the Act of Congress entitled "An Act to provide for and regulate the counting of the votes for President and Vice President, and the decision of questions arising therefrom, for the term commencing March 4, Anno Domini 1877."

The Electoral Commission mentioned in said Act, having received certain certificates and papers purporting to be certificates, and papers accompanying the same, of the electoral votes from the State of Florida, and the objections thereto submitted to it, under said Act, now report that it has duly considered the same pursuant to said Act, and has decided and hereby decides, that the votes of Frederick C. Humphreys, Charles H. Pearce, William H. Holden, and Thomas W. Long, named in the certificate of M. L. Stearns, Governor of said State, which votes are certified by said persons, as appears by the certificate submitted to the Commission as aforesaid, and marked No. 1 by said Commission and herewith returned, are the votes provided for by the Constitution of the United

States, and that the same are lawfully to be counted as therein certified—namely, four votes for Rutherford B. Hayes, of the State of Ohio, for President, and four votes for William A. Wheeler, of the State of New York, for Vice President. The Commission also had decided, and hereby decides and reports, that the four persons first before named were duly appointed Electors in and by said State of Florida.

The ground of this decision stated briefly as required by said Act, is as follows: That it is not competent, under the Constitution and the law as it existed at the date of the passage of said Act, to go into evidence *alibi* the papers opened by the President of the Senate in the presence of the two Houses, to prove that other persons than those regularly certified to by the Governor of the State of Florida, in and according to the determination and declaration of their appointment by the Board of State Canvassers of said State prior to the time required for the performance of their duties, had been appointed Electors, or by counter proof to show that they had not, and that all proceedings of the courts, or acts of the Legislature, or of the Executive of Florida, subsequent to the counting of the votes of the Electors on the prescribed day, are inadmissible for any such purpose.

As to the objection made to the eligibility of Mr. Humphreys, the Commission is of opinion that, without reference to the question of the effect of the vote of an ineligible elector, the evidence does not show that he held the office of Shipping Commissioner on the day when the Electors were appointed.

The Commission has also decided and does hereby decide and report that, as a consequence of the foregoing and upon the grounds before stated, neither of the papers purporting to be certificates of the electoral votes of said State of Florida, numbered 2 and 3 by the Commission and here-with returned, are certificates of the votes provided for by the Constitution of the United States, and that they ought not to be counted as such.

Done at Washington, the day and year first above written.

SAMUEL F. MILLER,
W. STRONG,
JOSEPH F. BRADLEY,
GEORGE F. EDMUNDS,
O. P. MORTON,
FREDERICK T. FRELINGHUISEN,
JAMES A. GARFIELD,
GEORGE F. HOAR,

Commissioners.

The question being on the adoption of the report of the Commissioners, it was decided in the affirmative—Yea, 8; nays, 7.

[Objections were made to the decision by the House, and the Houses separated and voted on the question, the Senate sustaining it, and the

House rejecting it; therefore the report was accepted, and the votes of Florida were counted for Hayes and Wheeler.]

February 12.

[When Louisiana was reached, three certificates were produced and read, to all of which objections were made, and the papers went to the Electoral Commission; a fourth was also presented, and the following is a report of the ensuing proceedings:]

▲ BURLESQUE CERTIFICATE.

Mr. STONE, of Missouri, one of the tellers, proceeded to read it, but it was obvious from the first sentence that it was a mere burlesque. It commenced by certifying that John Smith had been chosen an Elector from the First district; John Smith, No. 1, from the Second; John Smith, No. 2, from the Third; John Smith, No. 3, from the Fourth; John Smith, No. 4, from the Fifth; John Smith, No. 5, from the Sixth; and John Smith A, and John Smith B, Electors at large.

It followed the usual formalities, showing that John Smith had been duly chosen as chairman and John Smith B as sergeant-at-arms, and that John Smith No. 1 and John Smith A were appointed tellers; that the eight votes of the State had been cast for Peter Cooper, of New York, and Sam Cary, of Ohio.

At this stage of the reading Senator McDONALD, of Indiana, suggested that the two Houses should not be compelled to listen to the reading.

The PRESIDING OFFICER directed the address on the envelope to be read. It read,—

To the Vice President of the United States, Washington. Vote of the Electoral College of the State of Louisiana for President and Vice President, 1876.

He then directed the tellers to proceed with the reading.

The reading was then proceeded with to its close, it purporting to be signed by John Smith, Company Two, Bull-dozers, Governor of Louisiana, and winding up with the motto, "Such is life in Louisiana."

Subsequently the PRESIDING OFFICER directed the paper to be omitted from the proceedings of the joint convention.

February 19.

Decision of the Commission in the Louisiana case:

The Electoral Commission having received certain certificates and papers purporting to be certificates, and papers accompanying the same, of the electoral vote from the State of Louisiana, and the objections thereto submitted to it under said Act, now report that it has duly considered the same, pursuant to said Act, and has by a majority of votes decided, and does hereby decide, that the votes of William P. Kellogg, J. Henry

Burch, Peter Joseph, L. A. Sheldon, Morris Marks, Aaron B. Levisse, Orlando H. Brewster, and Oscar Joffrion, named in the certificate of William P. Kellogg, Governor of said State, which votes are certified by said persons, as appears by the certificates submitted to the Commission as aforesaid, and marked Nos. 1 and 3 by said Commission and herewith returned, are the votes provided for by the Constitution of the United States, and that the same are lawfully to be counted as therein certified —namely, eight votes for Rutherford B. Hayes, of Ohio, for President, and eight votes for William A. Wheeler, of New York, for Vice President.

The Commission has by a majority of votes decided, and does hereby decide and report, that the eight persons first before named were duly appointed Electors in and by the said State of Louisiana.

The brief ground of this decision is, that it appears upon such evidence as, by the Constitution and the law named in said Act of Congress, is competent and pertinent to the consideration of the subject, that the before-mentioned Electors appear to have been lawfully appointed such Electors of President and Vice President of the United States, for the term beginning March 4, 1877, of the State of Louisiana, and that they voted as such at the time and in the manner provided for by the Constitution of the United States and the law; and the Commission has by a majority of votes decided that it is not competent under the Constitution and the law, as it existed at the date of the passage of said Act, to go into evidence *aliunde* the papers opened by the President of the Senate in the presence of the two Houses, to prove that other persons than those regularly certified to by the Governor of the State, in and according to the determination of their appointment by the returning officers for elections in said State prior to the time required for the performance of their duties, had been appointed Electors, or by counter proof to show that they had not, or that the determination of said returning officers was not in accordance with the truth and fact; the Commission by a majority of votes being of opinion, that it is not within the jurisdiction of the two Houses of Congress, assembled to count the votes for President and Vice President, to enter upon a trial of such question.

The Commission, by a majority of votes, is also of opinion that it is not competent to prove that any of said persons, so appointed Electors as aforesaid, held an office of trust or profit under the United States at the time when they were appointed, or that they were ineligible under the laws of the State, or any other matter offered to be proved *aliunde* said certificates and papers.

The Commission is also of opinion, by a majority of votes, that the returning officers of election, who canvassed the votes at the election for Electors in Louisiana, were a lawfully constituted body by virtue of a constitutional law, and that a vacancy in said body did not vitiate its proceedings.

The Commission has also decided, and does hereby decide, by a majority of votes, and report as a consequence of the foregoing, and upon the ground before stated, that the paper purporting to be a certificate of the electoral votes of said State of Louisiana, objected to by T. O. Howe and others, marked N. C. No. 2 by the Commission and herewith returned, is not the certificate of the votes provided for by the Constitution of the United States, and that they ought not to be counted as such.

[The Houses again separated, and voted on this decision, and it was sustained by a non-concurrence as before.]

February 20.

When the vote of Michigan was reached, objections to its counting were offered.

[The objections were to the point that Benton Hanchett was voted for as an Elector, and certified as appointed an Elector; that on the day of the election, and for a long time prior thereto, and up to December 6, 1876, he was a U. S. Commissioner, by appointment of the U. S. Court for Michigan; that the statute of Michigan authorized the filling of vacancies in the office of Elector occasioned by death, refusal to act, or neglect to attend the meeting of the college; but there was no vacancy in the office for which Hanchett was voted, and to which he was not appointed by reason of the disqualification aforesaid; that the choice of Daniel L. Crossman, who was chosen to said vacancy by the other Electors, was wholly without authority of law and was void, and that his vote as an Elector should not be counted.]

The two Houses separated, disagreed, and the vote was counted.

When the certificate from the State of Nevada was read, objection was made to its being counted.

[The point was that R. M. Daggett, one of the Electors, was, on the 7th of November, 1876, a United States Commissioner for the Circuit and District Courts for Nevada, and held, therefore, an office of trust and profit under the United States, and as such could not be appointed an Elector under the Constitution of the United States; and that his vote as an Elector should not be counted.]

February 21.

[Both Houses concurred in counting the disputed vote from Nevada, because the allegation was an error, though before this fact was known, the Senate based their acceptance of the vote on the argument made by the Commission,—the incompetency of *aliunde* evidence.]

When Oregon was reached, two certificates were produced [one authenticated by the signature of the Governor and Secretary of State, as the statutes of Oregon required, in pursuance of the Act of 1792, and having

the seal of the State attached; and the other having no State authentication whatever], and both being objected to, they went to the Commission.

February 24.

[The Houses being met, the decision in the Oregon case was read, as follows:]

The Electoral Commission, having received certain certificates and papers purporting to be certificates, and papers accompanying the same, of the electoral vote from the State of Oregon, and the objections thereto submitted to it under said Act, now reports that it has duly considered the same pursuant to said Act, and has, by a majority of votes, decided, and does hereby decide, that the votes of W. H. Odell, J. C. Cartwright and J. W. Watts, named in the certificate of said persons, and in the papers accompanying the same, which votes are certified by said persons, as appears by the certificates submitted to the Commission as aforesaid, and marked No. 1, N. C. by said Commission and herewith returned, are the votes provided for by the Constitution of the United States, and that the same are lawfully to be counted as therein certified, namely:—Three votes for Rutherford B. Hayes, of the State of Ohio, for President, and three votes for William A. Wheeler, of the State of New York, for Vice President. The Commission has, by a majority of votes, also decided, and does hereby decide and report, that the three persons first above-named were duly appointed Electors in and by the State of Oregon.

The brief ground of this decision is, that it appears, upon such evidence as by the Constitution and the law named in said Act of Congress is competent and pertinent to the consideration of the subject, that the before-mentioned Electors appear to have been lawfully appointed such Electors of President and Vice President of the United States, for the term beginning March 4, A.D. 1877, of the State of Oregon, and that they voted as such at the time and in the manner provided for by the Constitution of the United States and the law; and they are further of opinion that, by the laws of the State of Oregon, the duty of canvassing the returns of all the votes given at an election of President and Vice President was imposed on the Secretary of State, and upon no one else; that the Secretary of State did canvass these returns in the case before us, and thereby ascertained that J. C. Cartwright, W. H. Odell, and J. W. Watts had a majority of all the votes given for Electors, and had the highest number of votes for that office, and by the express language of the statute those persons are deemed elected; that, in obedience to his duty, the Secretary of State made a canvass and tabulated statement of the votes showing this result, which, according to law, he placed on file in his office on the 4th day of December, A.D. 1876,—all this appears by an official certificate under the seal of the State and signed by him, and delivered by him to the Electors, and forwarded by them to the President of the Senate

with their votes; that the refusal or failure of the Governor of Oregon to sign the certificate of the election of the persons so elected does not have the effect of defeating their appointment as such Electors.

That the act of the Governor of Oregon in giving to E. A. Cronin a certificate of his election, though he received 1000 votes less than Watts, on the ground that the latter was ineligible, was without authority of law, and is therefore void.

That although the evidence showed that Watts was a Postmaster at the time of his election, that fact is rendered immaterial by his resignation both as Postmaster and Elector, and his subsequent appointment to fill the vacancy, so made, by the Electoral College.

The Commission has also decided, and does hereby decide, by a majority of votes, and reports that as a consequence of the foregoing, and upon the grounds before stated, the paper purporting to be a certificate of the electoral vote of said State of Oregon, signed by E. A. Cronin, J. N. T. Miller, and John Parker, marked No. 2, N. C. by the Commission and herewith returned, is not the certificate of the votes provided for by the Constitution of the United States, and that they ought not to be counted as such.

[The decision being objected to, the Houses separated, and there being a non-concurrence, it was sustained.]

When the returns of Pennsylvania were reached, objection was made to one of the votes.

[The point of objection was that Daniel J. Morrell, who was voted for on the 7th of November, 1876, was, at the time, a Centennial Commissioner, an office of trust and profit, under the Act of Congress of March 3, 1871, and was, therefore, constitutionally ineligible; that the Electors chose Henry A. Boggs to act in the place of Mr. Morrell, who failed to attend, and that such election was without authority of law, and null and void, there having been no vacancy to which he could be chosen.]

The Houses separated, disagreed, and the vote was therefore counted.

When Rhode Island was reached, one vote was objected to.

[The point was that G. H. Corliss, chosen November 7, was a Centennial Commissioner, and that W. S. Slater, subsequently chosen by the Legislature, was not legally appointed.]

The Houses separated, voted, and agreed to count said vote.

When the vote of the State of South Carolina was read, objections were made to each of the two certificates, on behalf of sundry Senators and Representatives; and all the papers were referred to the Electoral Commission.

February 28.

[The Houses being again met, the decision was read as follows:]

The Electoral Commission, mentioned in said Act, having received certain certificates and papers purporting to be certificates, and papers accom-

panying the same, of the electoral votes from the State of South Carolina, and the objections thereto submitted to it under said Act, now report that it has duly considered the same pursuant to said Act, and has, by a majority of votes, decided, and does hereby decide, that the votes of C. C. Bowen, J. Winsmith, Thomas B. Johnson, Timothy Hurley, W. B. Nash, Wilson Cook, and W. F. Meyers, named in the certificate of D. H. Chamberlain, Governor of said State, which votes are certified by said persons, as appears by the certificates submitted to the Commission as aforesaid, and marked No. 1, N. C. by said Commission and herewith returned, are the votes provided for by the Constitution of the United States, and that the same are lawfully to be counted as therein certified, namely, seven votes for Rutherford B. Hayes, of the State of Ohio, for President, and seven votes for William A. Wheeler, of the State of New York, for Vice President. The Commission has, by a majority of votes, also decided, and does hereby decide and report, that the seven persons first above named were duly appointed Electors in and by the State of South Carolina.

The brief ground of the decision is that it appears, upon such evidence as by the Constitution and the law named in said Act of Congress, is competent and pertinent to the consideration of the subject, that the before-mentioned Electors appear to have been lawfully appointed such Electors of President and Vice President of the United States, for the term beginning March 4, A.D. 1877, of the State of South Carolina, and that they voted as such, at the time and in the manner provided for by the Constitution of the United States and the law. And the Commission, as further grounds for their decision, are of opinion that the failure of the Legislature to provide a system for the registration of persons entitled to vote, does not render nugatory all elections held under said laws otherwise sufficient, though it may be the duty of the Legislature to enact such a law; if it were otherwise, all government in that State is a usurpation, its officers without authority, and the social compact in that State is at an end; that this Commission must take notice that there is a government in South Carolina, republican in form, since its constitution provides for such a government, and it is and was on the day of appointing Electors so recognized by the Executive and by both branches of the Legislative departments of the Government of the United States; that, so far as this Commission can take notice of the presence of the soldiers of the United States in the State of South Carolina during the election, it appears that they were placed there by the President of the United States to suppress insurrection at the request of the proper authorities of the State; but we are also of opinion that under the papers before us it appears that, the Governor and Secretary of State having certified under seal of the State that the Electors, whose votes we have decided to be the lawful electoral votes of the State, were duly appointed as Electors, which certificate, both by presumption of law and by the certificate of the rival claimants

of the electoral office, was based upon the action of the State canvassers, there exists no power in this Commission, as there exists none in the two Houses of Congress, in counting the electoral vote, to inquire into the circumstances under which the primary vote for Electors was given.

The power of the Congress of the United States in its legislative capacity to inquire into the matters alleged, and to act upon the information so obtained, is a very different one from its power in the matter of counting the electoral vote. The votes to be counted are those presented by the States, and, when ascertained and presented by the proper authorities of the States, they must be counted.

The Commission has also decided by a majority of votes, and does hereby decide and report, that as a cause of the foregoing, and upon the grounds before stated, the paper purporting to be the electoral vote of said State of South Carolina signed by Theodore R. Barker, S. McGowan, John W. Harrington, John Isaac Ingram, William Wallace, John B. Erwin, and Robert Aldrich, marked No. 2, N. C. by the Commission, and herewith returned, is not the certificate of the votes provided for by the Constitution of the United States, and that they ought not to be counted as such.

[Objection being made to the decision, the Houses separated, and, there being a non-concurrence, the decision was sustained.

A number of attempts were made to delay the proceedings by what is known as "filibustering," which, however, were frustrated.]

When the certificate of the State of Vermont was opened, Mr. POPPLETON asked if any other returns had been received from Vermont. The PRESIDING OFFICER replied that none had been received except the one submitted. The CONGRESSIONAL RECORD continues:

Mr. POPPLETON. I desire to say that I have prepared objections, upon information by telegraph and otherwise, that there were dual returns from the State of Vermont.

Mr. HEWITT, of New York. I desire to make a statement. I hold in my hand a package which purports to contain electoral votes from the State of Vermont. This package was delivered to me by express about the middle of December last, and with it came a letter stating that a similar package had been forwarded by mail to the Presiding Officer of the Senate. Being informed to-day that no package corresponding to this had been received by mail by the Presiding Officer of the Senate, I called upon him, and inquired whether any other than one certificate from the State of Vermont had been received by him by mail, and he informed me that there had been no other received by him than the one which was already in his possession. I tendered to him this package, the seals of which are unbroken, and which is now as it came into my possession. He declined to receive it, upon the ground that he had no authority in law so to do. Under the circumstances I now tender this package to the

Presiding Officer of the Senate as purporting to contain electoral votes from the State of Vermont.

The PRESIDING OFFICER. The Chair has stated that he has received but one set of certificates from the State of Vermont. He also states that the law prohibits him from receiving any after the first Thursday in February. His duty is to receive and open and have read all certificates that have been received by him up to and on that day.

[This subterfuge was resorted to in order to bring the question before the Commission, and thus to prolong the contest beyond the 4th of March.]

The PRESIDING OFFICER declined to entertain any proposition or motion except an objection to the vote presented. Finally, objections were made on behalf of sundry Senators and Representatives.

[The Houses separated, disagreed, and the vote was counted.]

March 1.

When the certificates of Wisconsin were read objection was made to one vote.

[The objection was to the vote of Daniel L. Downs, who was a pension surgeon and examining surgeon at the time of the meeting of the Electors.]

The Houses separated, disagreed, and the vote was counted.

March 2.

The counting of the votes of the Electors being concluded, Mr. Allison, one of the tellers, announced the result; whereon the President of the Senate declared the persons elected.

March 3.

The House of Representatives passed a resolution repudiating the Commission's decisions, their confirmation by Congress, the Electoral Act, and the President-elect; and avowing it to be "the duty of this House to declare that Samuel J. Tilden, of New York, and Thomas A. Hendricks, of Indiana, having received a majority of the votes of the Electors appointed, were thereby duly elected President and Vice President of the United States of America, for the term of four years commencing the 4th of March, 1877."

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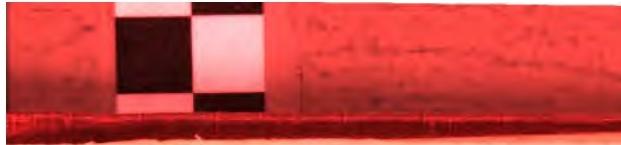
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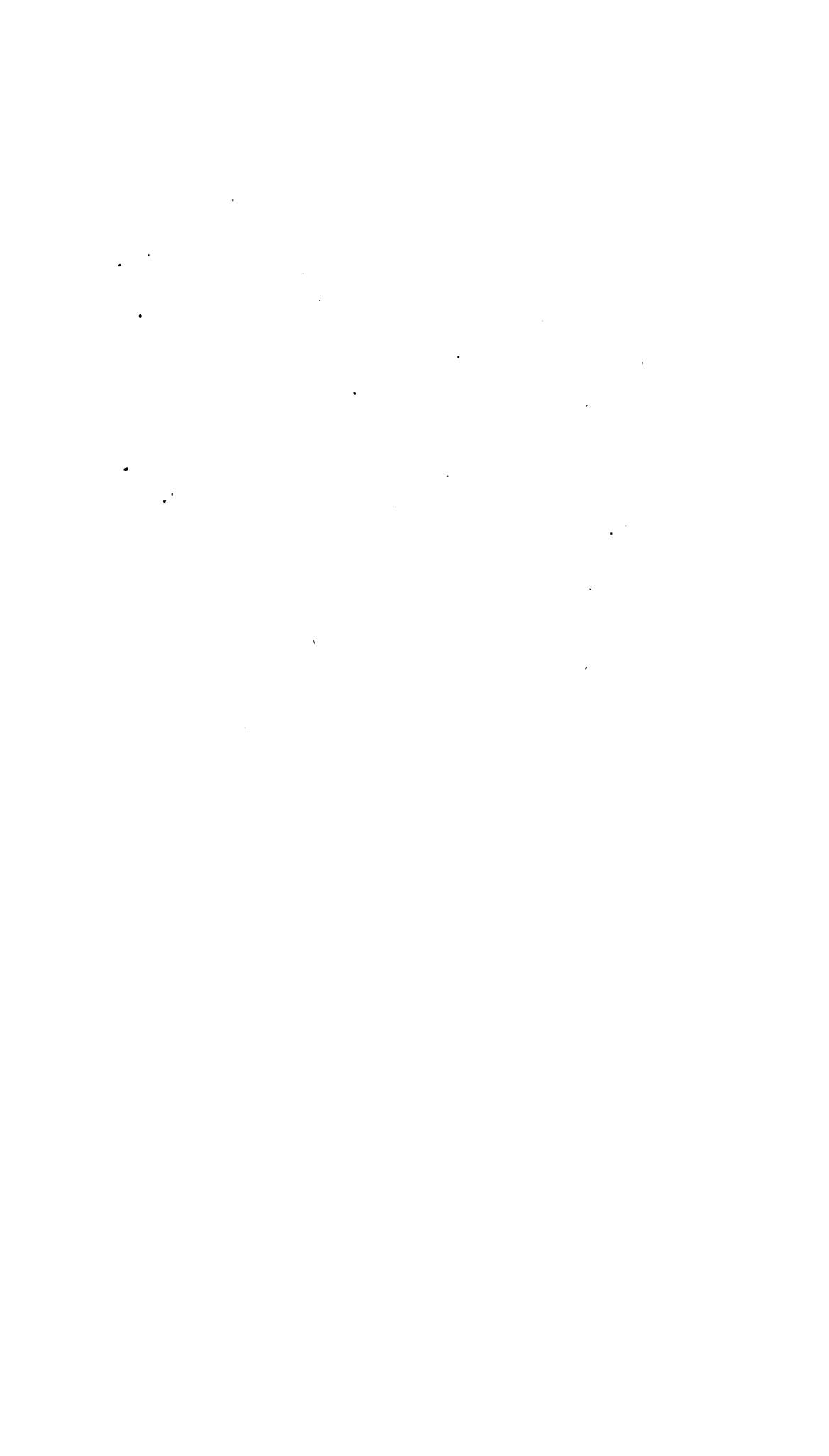


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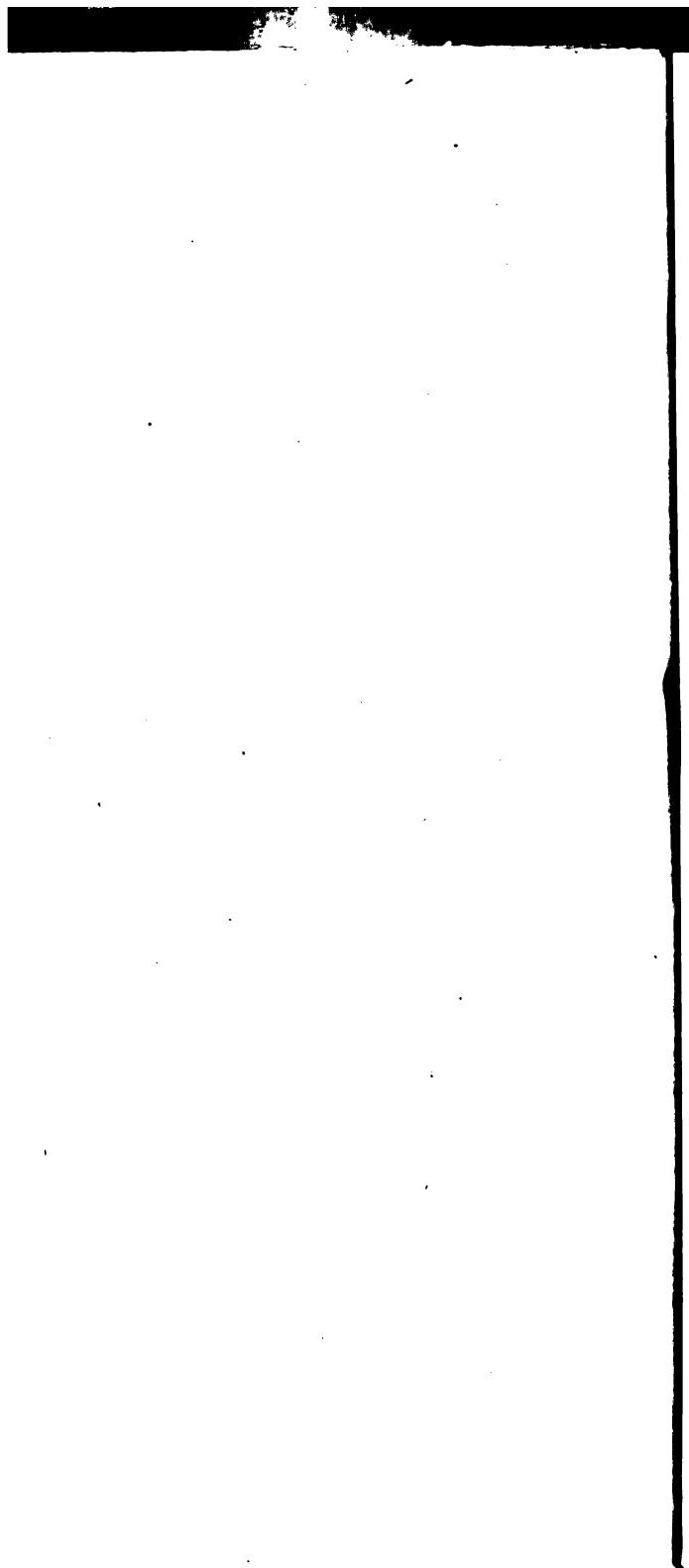
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